89-380

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

CARL P. CALDWELL,

Petitioner,

vs.

SOUTHWESTERN BELL TELEPHONE COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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210P

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UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

CARL P. CALDWELL,	)	[FILED
	)	U.S. Ct. App.
Plaintiff/Appellant/	)	10th Cir.
Cross-Appellee/	)	April 24, 1989
Appellee,	)	Robert L. Hoecker
	)	Clerk]
v.	)	
	)	
SOUTHWESTERN BELL	)	Nos. 87-2647
TELEPHONE COMPANY,	)	87-2711
	)	88-1332
Defendant/Appellee/	)	(W.D. Okla.)
Cross-Appellant/	)	
Appellant.	)	(D.C. No. CIV-81-114T)

ORDER AND JUDGMENT*

Before **MOORE** and **ANDERSON**, Circuit Judges, and **BROWN**, ** Sr. District Court Judge.

This is an age discrimination case brought by Carl P. Caldwell under the Age

*This order and judgment has no precedential value and shall not be cited, or used by any court within the Tenth Circuit, except for purposes of establishing the doctrines of the law of the case, res judicata, or collateral estoppel. 10th Cir. R. 36.3.

** Honorable Wesley E. Brown, Sr. Judge, U.S. District Court, for the District of Kansas, sitting by designation.

Discrimination in Employment Act (the "ADEA"), 29 U.S.C. §621, et. seq., against his former employer, Southwestern Bell Telephone Company ("Bell"), following his involuntary retirement by Bell, solely for reasons of age, at age sixty five. The parties have filed cross-appeals from various rulings and the judgment of the district court in Caldwell's favor in the amount of $322,386.39, together with costs and post judgment interest. Although many issues are raised, the threshold question both in the district court and here is whether Caldwell's retirement falls within the bona fide executive exception to the age limit established by the ADEA, 29 U.S.C. §631(c)(1). At times relevant hereto[1] that section provided:

> (c) Bona fide executives or high policymakers

---

1 The section has subsequently been amended in minor ways not pertinent to this opinion.

> (1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, or the employer of such employee, which equals, in the aggregate, at least $27,000.

The district court granted summary judgment against Caldwell on the question of Caldwell's status as an "executive" of Bell within the meaning of that term as used in the bona fide executive exception. We affirm that ruling. The district court, however, ruled that the bona fide executive exception did not apply to Caldwell because his entitlement to a pension benefit immediately upon retirement was theoretically forfeitable under the provisions of Bell's pension plan, in violation of the nonforfeitability

requirement of the exception. The summary judgment against Bell on that issue is the sole basis for liability upon which the judgment below rests. Bell appeals that summary judgment, and we reverse.

With respect to the single basis for liability in this case, upon which we reverse the district court, it appears that this case presents a non-recurring issue since it is confined to periods prior to 1982.

I.

Caldwell contends that a genuine issue of fact exists as to whether he was an executive within the meaning of section 631(c)(1), thus requiring a reversal of the district court's summary judgment on the point. Our review of the issue is governed by settled standards. The facts must be viewed in a light most favorable to Caldwell, the nonmoving party, Setliff v. Memorial Hospital of

Sheridan County, 850 F.2d 1384, 1391-92 (10th Cir. 1988); McKibben v. Chubb, 840 F.2d 1525, 1528 (10th Cir. 1988), but the mere existence of some factual dispute is not necessarily enough. There must be a genuine issue of material fact. Fed. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). If the record, viewed favorably to Caldwell, establishes that the point in question could not survive a motion for a directed verdict, then summary judgment must be upheld. Celotex Corp. v. Catrett, 477 U.S. at 322-23; Anderson v. Liberty Lobby, Inc., 477 U.S. at 251-52; Lake Hefner Open Space Alliance v. Dole, No. 87-1381 at 7-8, 1989 U.S. App. Lexis 3773, (10th Cir. March 28, 1989).

Caldwell began his employment with Bell in 1935 in Dallas as a file clerk. He was promoted to toll billing

supervisor, his first management position, in 1940. After various other management level positions he was promoted in 1964 to the position of General Accounting Manager, which was the department head of the accounting department of Bell for the State of Oklahoma. Although his title was changed to General Manager-Comptroller in 1978, he basically remained in this position until his retirement in 1979. See Addendum to Answer Brief of Appellee and Brief in Chief of Cross Appellant at Tab 11, pp. 3, 7.

Caldwell had been at the salary grade level 5A, the highest management level which is also referred to as the "department head" level, since 1964. The annual expense budget for his position was $7.5 million (in 1976). At the time he was retired, 441 employees reported directly to him. There were only 8 other employees at the fifth level in Oklahoma

and only one employee in Oklahoma that was at a higher level than Caldwell. He was among the top .5 percent of management in Bell and among the top . 4 percent of management in Bell's Oklahoma operations. See Id. at 6-8, 16-22, and charts and materials at end of brief. Caldwell does not contest any of the above facts.

A job position description, which was signed and concurred in by Caldwell, states, inter alia, that Caldwell's position included statewide responsibility for all aspects of comptroller operations, and for directing all matters relating to personnel administration, including the selection, training and development of all management employees. Id., Exhibit A. The job position description indicates that Caldwell had a great amount of responsibility as well as discretion: "The incumbent has very little direct guidance in the operations

of his organization. Exerts wide discretion in administering the job and determining where personnel should be utilized to achieve the most effective and productive results." Id.

Pursuant to its authority in 29 U.S.C. §628 to promulgate rules and regulations to carry out the ADEA, the Equal Employment Opportunity Commission (EEOC) issued 29 C.F.R. § 1625.12 entitled "Exemption for Bona Fide Executive or High Policymaking Employees," which became effective November 21, 1979. This "final interpretation" discusses what is meant by "executive." To qualify, the employer must first show that the employee satisfies the definition of "executive" in 29 C.F.R. § 541.1, that is, in pertinent part, that the individual is an employee:

> (a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department or subdivision thereof; and

> (b) Who customarily and regularly directs the work of two or more other employees therein; and
>
> (c) Who has the authority to hire or fire other employees . . . ; and
>
> (d) Who customarily and regularly exercises discretionary powers; and
>
> (e) Who does not devote more than 20 percent . . . of his hours in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section . . . .

Caldwell admitted in his deposition to being an "executive" under these standards. The EEOC's final interpretation further provides that the employee must also meet the criteria established in the examples from H.R. Rep. No. 950, 95th Cong., 2d Sess. 9, reprinted in 1978 U.S. Code Cong. & Admin. News 528, 531, see 29 C.F.R. § 1625.12(d)(2), which in pertinent part, provides:

> Typically the head of a significant and substantial local or regional operation of a corporation, such as a major production facility or retail establishment, but not the head of a minor branch, warehouse

> or retail store, would be covered by the term "bona fide executive." Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.
>
> The heads of major departments or divisions of corporations [would also be covered].
>
> In a large organization the immediate subordinates of the heads of these divisions sometimes also exercise executive authority, within the meaning of this exemption. The conferees intend the definition to cover such employees if they possess responsibility which is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.

29 C.F.R. § 1625.12(d)(2) states that the exemption is only applicable to "a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business" and not to "middlemanagement employees."

Upon close examination of the briefs and other materials before the court, it is apparent that the district court did

not err in granting summary judgment in favor of Bell on the issue of whether Caldwell was a "bona fide executive" pursuant to these criteria. As the district court commented:

> The definition contained [in the various regulations and interpretations described above] unmistakably applies to the plaintiff based upon the facts which are contained in the record. [Caldwell] was department head of the accounting department for Oklahoma. He was considered by [Bell] to be at the fifth management level which was the highest level of management of the department heads in Oklahoma. Management levels three and four, as well as all 441 employees of the department, reported directly to him. Based upon the job description, written by [Caldwell] himself, he exerted wide discretion in administering and deciding where to utilize personnel most effectively and productively. He was also responsible for selection, training, and monitoring the progress of all management employees. Based upon these undisputed facts, as a matter of law, [Caldwell's] job fell within the "bona fide executive" exception of the ADEA.

Memorandum Opinion and Order at 3-4 (May 22, 1986). We are in complete agreement with the district court. We view the

applicable standards and guidelines discussed above as fairly describing and applying to Caldwell's position with Bell for at least the two years immediately preceding his retirement in November 1979. In addition to the reasoning of the district court we note that because Caldwell was among the top .5 percent of management of Bell (and among the top .4 percent of Bell's Oklahoma operations) that he was indeed one of the "top fe employees" who exercise substantial executive authority (i.e. wide discretionary powers) over a significant number of employees. See 29 C.F.R. § 1625.12(d)(2).

Our view is not altered by the facts or theories advanced by Caldwell. One of Caldwell's primary contentions is that the question of whether an employee is an executive is inherently factual and not a proper subject for summary judgment. However, we note that none of the

material facts regarding Caldwell's employment position are in dispute. Therefore, the only question at hand is what was intended by the phrase "bona fide executive." It is well established that questions of statutory construction and congressional intent present questions of law properly resolved by summary judgment. State of Okla. ex rel. Dept. of Human Services v. Weinberger, 741 F.2d 290, 291 (10th Cir. 1983); Union Pacific Land Resources Corp. v. Moench Investment Co., 696 F.2d 88, 93 (10th Cir. 1982), cert. denied, 460 U.S. 1085 (1983). Even if the question were "factual" as Caldwell argues, summary judgment would nonetheless be appropriate because, as indicated above, all the relevant facts are undisputed and therefore there is no genuine issue of fact. See Anderson v. Liberty Lobby, Inc., 477 U.S. at 247-48.

Caldwell argues that he was not one of

the 38 "officers" or "officer-level" personnel of Bell, was not listed in the "executive" section of the Bell telephone directory, and that Bell failed to produce any documents in which Bell advised employees of his salary grade level that they were bona fide executives. These technical arguments simply do not conform to the reality of the situation and to the standards and guidelines set forth in 29 C.F.R. § 1625.12 which make it clear that it is the job content and responsibility compared within the company itself and the marketplace, and not the job title or whether the employee in question is informed of his "executive" status, which is determinative.

Caldwell argues that because of his job was to "administer" his department in accordance with "instructions" from his superiors in St. Louis that he is not an executive. However, as discussed above,

Caldwell's position "has very little direct guidance." He merely had to operate "within the policies established at the officer level within the company." SJ Brief, Exhibit A. Caldwell nonetheless had "substantial executive authority." Caldwell's other arguments are equally meritless.

Giving full weight to the standards and guidelines enumerated above, Caldwell's arguments fall far short of overcoming the central realities of Caldwell's position of authority and supervisory responsibility. Whether viewed in proportion to Bell's total work force or in proportion to Bell's total work force in Oklahoma, Caldwell simply cannot be regarded as middle level management. He was in fact one of a handful of top employees in a major area, the state of Oklahoma, and held very significant supervisory and executive authority in Bell and over a large number

of employees.

II.

Section 631(c)(1) permits the compulsory retirement of bona fide executives at age sixty-five "if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension [plan] . . . of the employer of such employee . . ." Id. (emphasis added). It is conceded that Caldwell has at all times been entitled to his pension, has received all of his pension benefits, and has never faced and never will face any realistic possibility of forfeiture. However, the district court held essentially that Bell was foreclosed from using the bona fide executive exception for Caldwell or anyone else in 1979 because its pension plan violated certain technical limitations with respect to forfeitability. In other words, the district court, in essence, disqualified

the Bell plan (and the plans of other companies in the AT&T system nationwide), insofar as it attempted to make use of the bona fide executive exception, and did so for the entire period from the ADEA amendment effective in 1978 to the effective date of relevant final regulations under the ADEA on January 1, 1982, at which time the plan provisions were amended.

The dispute lies with the provision in Bell's pension plan in 1979 which required the suspension of benefit payments to a retiree during periods of reemployment within the AT&T group of companies. Caldwell has contended throughout these proceedings, and the district court held, that under the facts presented here the possibility of a suspension of payments upon reemployment within the AT&T system technically rendered Caldwell's benefits forfeitable, in violation of the statute.

The controlling facts are as follows. Beginning as early as 1913, companies within the AT&T system adopted similar but separate pension plans and provided for full reciprocity of obligations between companies in the system by means of interchange agreements. The interchange agreements enabled management employees, for instance, to transfer from company to company within the AT&T system without loss of service credits and other benefits. In other words, pension benefits were portable within the AT&T system. The participating companies were referred to as "interchange companies." The Bell plan suspended benefit payments of a retiree during the period that the retiree was reemployed by Bell or any of the other interchange companies.[2] There were thirty-seven of

---

2 The plan provided:

"Regular employment with this Company or with any company with which

(Footnote -2- Cont. Next Page)

these AT&T system interchange companies at the time of Caldwell's retirement. Thirty-four of the companies were 80% or more owned by AT&T. Three were not: Rochester Telephone Company, Cincinnati Bell, Inc., and Southern New England Telephone Company. As will be explained more fully below, that fact was the critical element in the district court's determination.

Testing the Bell suspension of payments provision against the nonforfeitability requirement of § 631(c)(1) is something of a labyrinthine

(FOOTNOTE -2- CONT.)

> arrangements for interchange of benefit obligations, as described in Section 9 of these Regulations, have been made directly or indirectly, shall suspend the right of a retired employee or person receiving a deferred vested pension to pension payments during the period he continues in such employment."

Section 4.6, Plan for Employees' Pensions, Disability Benefits and Death Benefits (effective 11/30/79), Reply Brief of Cross-Appellant Southwestern Bell Telephone Co., at Tab 1.

§ 631(c)(1) is something of a labyrinthine process. Several years prior to the enactment of section 631(c) the nonforfeitable pension standard appeared for various purposes and in various contexts in the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§ 1001-1461,[3] and in simultaneously enacted counterparts in the Internal Revenue Code (the "Code"). In particular, the standard of nonforfeitability with respect to pensions was built into the minimum vesting provisions of ERISA and the Code as § 203 of ERISA, 29 U.S.C. § 1053, and § 411 of the Code, 26 U.S.C. § 411. Both of those statutes specifically provide

---

[3] To facilitate review of the ERISA provisions and comparison with the other statutory sections discussed in this opinion, we have provided citations to ERISA as codified, and not to the Act itself. In the interest of clarity, and despite the imprecision involved, this opinion will still refer to these codified sections as "ERISA."

that no forfeiture occurs within the meaning of the statute when pension benefits are suspended upon reemployment of a retired "employee" by an "employer who maintains the plan under which such benefits were being paid." 29 U.S.C. § 1053(a)(3)(B), 26 U.S.C. § 411(a)(3)(B).[4]

---

[4] The statutes in question are virtually identical in wording. 26 U.S.C. § 411(a)(3)(B) provides (as does 29 U.S.C. § 1053(a)(3)(B)):

> § 411. Minimum vesting standards
>
> (a) General rule.--A trust shall not constitute a qualified trust under section 401(a) unless the plan of which such trust is a part provides that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age . . . .
>
> . . .
>
> (3) Certain permitted forfeitures, suspensions, etc.--For purposes of this subsection--
>
> . . . .
>
> (B) Suspension of benefits upon reemployment of retiree.--A right to an accrued benefit derived from employer contributions shall not be treated as

(FOOTNOTE CONT. NEXT PAGE)

Section 414(b) of the Code and section 210(c) of ERISA (29 U.S.C. § 1060(c)), were both enacted at the same time as the nonforfeitability sections just mentioned. These latter statutes provided further that for various sections of the Code and ERISA, including § 411 of the Code and § 203 of ERISA (29 U.S.C. § 1053), "all employees of all

---

(FOOTNOTE CONT. FROM PREVIOUS PAGE)

forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits--

(i) in the case of a plan other than a multiemployer plan, by the employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, the same trade or craft, and the same geographic area covered by the plan as when such benefits commenced.

The Secretary of Labor shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

corporations which are members of a controlled group of corporations (within the meaning of §1563(a)[of the Code] . . .) shall be treated as employed by a single employer." Section 1563(a) of the Code defines a controlled group of corporations, insofar as relevant here, as corporations owned by or connected to a common parent by 80% or more stock ownership.

For purposes of consistency among statutes requiring nonforfeitability of pension benefits, the Equal Employment Opportunity Commission (the "EEOC") in its "final interpretations" issued on November 21, 1979 with respect to §631(c) of the ADEA, linked §631(c) to §411(a)(3) of the Code; and, therefore, the same provision in ERISA, §203(a)(3) (29 U.S.C. § 1053(a)(3)). The extent of that linkage, and whether the EEOC intended to be potentially less restrictive in its interpretation of § 631(c) of the ADEA

than § 411(a)(3) of the Code, is not clear from the specific language used by the Agency. Until 1987 it appeared at 29 C.F.R. § 1625(k)(1), as follows:

> (k)(1) The annual retirement benefit must be "nonforfeitable." Accordingly, the exception may not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree or result in the reduction of benefits to less than $27,000 in any one year. For example, where a plan contains a provision under which benefits would be suspended if a retiree engages in litigation against the former employer, or obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable. However, retirement benefits will not be deemed forfeitable solely because the benefits <u>are</u> discontinued or suspended for <u>reasons</u> permitted <u>under section 411(a)(3) of the Internal Revenue Code.</u> (Emphasis added.)

Accordingly, the district court faithfully followed the trail just outlined, from §631(c)(1) of the ADEA, to §§ 411(a)(3)(B) and 414(b) of the Code. It then held that the Bell plan violated §411(a)(3)(B) of the Code because the plan provision in question was tied to

companies with reciprocal benefit plans instead of companies in a controlled group. As previously indicated, three of the thirty-seven companies in the AT&T interchange system were less than 80% owned by AT&T, and it was this point upon which the district court seized. An additional point not mentioned can be added. Section 414 of the Code refers to a single plan, whereas the AT&T interchange system was built on plans separately maintained by each company.

However, the basic premise upon which the district court's decision rests, and which Caldwell urges again on appeal, is that the definition of "employee" of an "employer who maintains the plan" was settled law in 1979, circumscribed by the apparently plain meaning of those words, further defined by the controlled group concept of § 414. We disagree with that premise. In § 411(a)(3)(B) of the Code, and § 203(a)(3)(B) of ERISA (29 U.S.C.

§ 1053(a)(3)(B)), Congress expressly delegated broad responsibility to the Secretary of Labor to promulgate regulations to carry out the purposes of those subparagraphs, including "regulations with respect to the meaning of the term 'employed.'"[5] While the extent of that authority may be open to debate, it is clear that employers and the Department of Labor itself thought it probably included the power to place reciprocal plans within the regulations under § 411 of the Code and § 203 of ERISA (29 U.S.C. § 1053). In fact, the Department assumed it even had the power to include or exclude controlled groups of corporations from the definition of "employer who maintains the plan" for purposes of section 203(a)(3)(B) of ERISA (29 U.S.C. § 1053(a)(3)(B)). In its comments to its proposed regulations

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[5] See n.4.

published on January 19, 1981, the Department weighed the pros and cons of including controlled groups of corporations and opted to include them. See 29 C.F.R. 2530.203-3(c).[6]

---

[6] The Department explained this section as follows:

> C. Employment in Section 203(a)(3)(B) Service
>
> . . . .
>
> An "employer maintaining the plan"--non-multiemployer plans. The Act provides that, in the case of a plan other than a multiemployer plan, benefits may be suspended if a retiree is reemployed by an employer who maintains the plan under which such benefits were being paid. The Department proposed to include employers described in 29 CFR. §2530.210(d) and (3) as "employers who maintains the plan" for purposes of suspension of benefits.
>
> Section 2530.210 generally sets forth rules for determining the employer or employers who maintain a plan. Paragraph (d) of that section requires, in effect, that under a plan maintained by one or more members of a controlled group of corporations, service with any employer which is a member of the controlled group shall be taken into account for purposes of participation, vesting, and benefit accrual. Similarly, paragraph (e)

It was simply impossible in 1979 to derive firm definitions from the language of § 411(a)(3)(B) of the Code

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(FOOTNOTE 6 CONTINUED)
of that section requires, in effect, that under a plan which is maintained by one or more trades or businesses which are under common control, service with any employer which is under common control, shall be taken into account for these purposes.

Inclusion of the above described entities as "employers who maintain the plan" was criticized in the comments on the ground that it could result, especially in the case of large corporate conglomerates, in a far reaching limitation on post-retirement employment. This provision was also criticized as being too limited, and not accommodating situations where a non-multiemployer plan credits participants for service with related employers who maintain separate plans and who would not be considered members of a controlled group, or under common control, with an employer maintaining the plan.

Because the minimum standards rules under 29 CFR Part 2530 generally present a body of interdependent provisions, and because the Department believes that interpretation of the phrase "an employer who maintains the plan" in section 203(a)(3)(B)(i) should be
(FOOTNOTE 6 CONTINUED NEXT PAGE)

or § 203(a)(3)(B) of ERISA (29 U.S.C. § 1053(a)(3)(B)) when the parameters of such definitions were left by the same statutes to future action by the Secretary of Labor in regulations promulgated for the purpose.[7] By the same token, § 414 of the Code cannot be regarded as the final

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(FOOTNOTE 6 CONTINUED)

> consistent with the meaning given to that phrase as used in other sections of Part of Title I of the Act, the Department believes that it is appropriate to include employers described in §2530.210(d) and (e) as employers maintaining the plan for purposes of suspension of benefits.

Dept. of Labor Notice of Final Regulation, Filed June 19, 1981, for 29 C.F.R. §2530.203-3, Pens. Rep. (BNA) No. 326, at R-50 to R-51 (Jan. 26, 1981)(emphasis added)(footnotes omitted).

[7] Because of that specific grant of authority, Caldwell's reliance upon the general definition of nonforfeitability in 29 U.S.C. § 1002(19) is not helpful, nor, for the same reason, is Caldwell's reliance upon various notices by the Department of Labor to the effect that until the proposed regulations became final plans would be judged by the law without reference to the regulations. 43 Fed. Reg. 59098, 59099 (1978).
(FOOTNOTE 7 CONTINUED NEXT PAGE)

explanation of the reach of § 411, since that would vitiate the express and simultaneous statutory grant of authority for that purpose given to the Secretary of Labor in § 411(a)(3)(B) itself.

Pursuant to its identical grants of authority in both statutes, the Department of Labor entered into an extensive rulemaking process with respect to the definitions and application of both § 411(a)(3)(B) of the Code and § 203(a)(3)(B) of ERISA (29 U.S.C. § 1053(a)(3)(B)), as well as other portions of the statutes. That process was in a high state of flux in November, 1979, when Caldwell was retired. In fact, the Department of Labor at that time was

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(FOOTNOTE 7 CONTINUED)

Furthermore, such provisions were not meant to penalize employers. To the contrary, they were intended to assure employers that they would not be penalized retroactively for not observing various restrictions which were being proposed in the regulations, but which would not be enforced until the regulations became final. Id.

actively soliciting and receiving comments from employers.

On December 19, 1978, the Department of Labor published at 43 Fed. Reg. 59098 (1978), its notice of proposed rule-making on "Suspension of Benefit Rules," 29 C.F.R. § 2530.203-3, relating to the statutes in question, and inviting comments and setting up a hearing schedule. As part of the normal hearing and comment process, AT&T wrote to the Department of Labor on March 5, 1979, expressing concern that a literal reading of the proposed regulations would exclude suspensions of benefits to retirees who are reemployed by companies maintaining reciprocal benefit arrangements with one another, under separate plans. It urged a clarification to include such arrangements, stating:

> Under [proposed] Section 2530.203-3(b)(1), a plan may permanently suspend pension benefits because of reemployment of a retiree if such individual completes 40 or more hours of

service for an employer which maintains the plan, including employment by an employer which is a member of a control group of corporations, another member of which is paying the pension. In our opinion, such a rule is overly restrictive and does not take full cognizance of economic realities. The Bell System is comprised of a number of associated and subsidiary companies, most of which are members of a control group of corporations within the meaning of Section 1563 of the Internal Revenue Code. However, certain associated Bell System companies, such as Southern New England Telephone Company and Cincinnati Bell, are not members of such control group. Nonetheless, these latter companies and other Bell System companies commonly participate in an arrangement whereby service for one such company is recognized by any other such company for which an individual is employed for purposes of pension plan participation, vesting and benefit accrual under essentially identical plans maintained by each company. A literal application of the proposed Department rule would not allow for the suspension of pension payments upon the reemployment of a retiree who is receiving a pension payment from one Bell System "interchange" company and who is reemployed by another such company. This is because the proposed regulation appears to restrict the suspension to instances of reemployment by an employer who maintains the <u>same plan</u> as the employer making the pension payments and who is also a

> member of the control group. We suggest an alternative rule which would give effect to the practice of the Bell System and other national multiple corporation groups and which would allow for the suspension of pension payments upon reemployment by any member of such group if either (1) the current employer is a member of a control group of which the employer making the pension payments is also a member, or (2) the current employer and the employer making the pension payments credit an employee for service with each other for all purposes of participation, vesting and accrual, as long as, in either (1) or (2) above, the current employer and the employer making the pension payments maintain the same or similar plans.

Addendum to Answer Brief of Appellee and Brief in Chief of Cross-Appellant, Southwestern Bell Telephone Co., Tab 7, pp. 2-3 (emphasis in original).

A collateral, but relevant, event also occurred during this period. Companies within the AT&T system, including Bell, had amended their pension plans to conform to the 1978 amendments to the ADEA. The plan amendments prohibited compulsory retirement until age seventy,

with exceptions which included bona fide executives, who could be retired at age sixty-five as permitted by the ADEA. The amendments also included the provision at the heart of this dispute. That is, the amended Bell plan expressly provided for a suspension of benefits upon reemployment with a company which maintained an interchange of benefits with Bell. The amended plan was submitted to the Internal Revenue Service which notified Bell on July 11, 1979, that its plan, as amended, qualified under the provisions of the Code, which would include § 411(a)(3)(B).

The interpretative and rule-making process by the Department of Labor continued in flux through January 19, 1981, when the Department filed and published its proposed final regulations on suspension of benefit rules. In its published comments it directly addressed the question of reciprocal benefit

arrangements which had been raised by AT&T and others, and urged upon the Department. It stated:

> "Reciprocity" and similar arrangements. Many commentators urged the Department to clarify [not extend] the applicability of provisions of the proposed regulation in the situation where a plan is a party to a reciprocal or similar type of arrangement, under which service by a plan participant for an employer which maintains a separate plan may, for example, be treated as service under the participant's plan for various purposes, or may be combined with service under the participant's plan in order to calculate the participant's entitlement to benefits. In the context of multiemployer plans, commentators suggested that terms "industry" and "geographic area covered by the plan" should be defined to include the industries and geographic area covered by plans with which the participant's plan has entered into a reciprocal agreement. With respect to plans other than multiemployer plans, it was suggested that the definition of the term "an employer which maintains the plan" should be defined to include an employer with which the participant's plan has an agreement for crediting service. Commentators argued that these changes should be adopted because under these types of arrangements, plan participants are afforded opportunities for benefit accrual, vesting and portability beyond

> those required by the Act. While the Department generally supports the goals which reciprocal and similar arrangements seek to achieve, the Department is concerned that adoption of the suggestions described above might broaden the authority of plans to impose suspensions beyond that contemplated by Congress. Accordingly, pending further study of the general nature, extent and effect of reciprocal and similar arrangements, the Department has decided not to adopt, at this time, the changes suggested in this regard.

Department of Labor Notice of Final Regulations filed January 19, 1981, for 29 C.F.R. § 2530.203-3, Pens. Rep. (BNA) No. 326, at R-51 (Jan. 26, 1981) (emphasis added).

On October 1, 1980, the Bell pension plan and plans of other companies in the AT&T system were merged. Affidavit of Therese F. Pick at Tab 2, pp. 2-3, Addendum to Answer Brief of Appellee and Brief in Chief of Cross-Appellant, Southwestern Bell Telephone Company. After the Department of Labor's final regulations (which did not include

companies having reciprocal benefit arrangements) became effective on January 1, 1982, the AT&T system-wide pension plan (which covered Bell) was immediately amended, effective as of that date, to limit the suspension of benefits to instances of reemployment with any company owned 80% or more by AT&T, i.e. the controlled group of corporations. That change, of course, was essentially technical and non-substantive, since it simply excluded the two remaining minority owned companies, Southern New England Bell and Cincinnati Bell (the other minority-owned company, Rochester, had been merged into AT&T in 1980).

This process, including relevant agency action, the conduct of Bell and other employers, and the broad authority given to the Department of Labor in the statutes to which the EEOC has referred for guidance under § 631(c), do not support the judgment of the district

court. While we by no means suggest that any interpretation of a statute is permissible until final regulations are published, we conclude that Bell's interpretation of the nonforfeiture provision of the bona fide executive exception in November 1979, and its inaction while seeking the type of clarification which Congress had expressly delegated to the Department of Labor, did not violate the statute. We arrive at that conclusion fully taking into consideration the general rule that this and similar statutes must be narrowly construed. See 29 C.F.R. § 1625.12(b).

First, it was apparent at the time of enactment that the interpretation of the nonforfeitability requirement in § 631(c)(1) was not to be confined to the words of that statute itself. The statute fell within the context of similar ERISA and tax provisions. In

acknowledgment of that fact, the EEOC expressly tied the interpretation of forfeitability under § 631(c)(1) to criteria set forth in the tax statute (§ 411(a)(3)(B)). That statute was, in turn, subject to interpretation by the Department of Labor, as was its counterpart in ERISA.

Second, it was equally apparent that exceptionally broad powers had been given to the Department of Labor by Congress in the ERISA and tax statutes to define the scope of employment or reemployment for permissible suspension of benefits purposes. Those powers reasonably included the power to include interchange companies and reciprocal plans within the term "employer." The comments by the Department of labor in its January 1, 1981 release to the effect that it would give "further study" to the interchange company proposal, but would not adopt it "at this time," suggest that the

Department itself believed it had the power to adopt such a definition. It is particularly significant that the Department of Labor, as late as January 19, 1981, treated the inclusion or exclusion of controlled groups of corporations within the relevant statutory definition as something which the agency had the power to decide, notwithstanding § 414(b) of the code and § 210(c) of ERISA (29 U.S.C. § 1060(c)).

Third, agency interpretation of the scope of the relevant statutes was in flux and constantly changing from 1978 through December 4, 1981. The "controlled group" inclusion under the definition of "employer who maintains the plan" was not <u>necessarily</u> the limit of that definition until January 1, 1982. Companies such as AT&T, inclusive of Bell, were not only entitled to view the definitional process as fluid, they, as part of the interested public, were

expressly solicited by the Department of Labor for input into shaping the governing regulations.

Fourth, when subsequent to the adoption of the 1978 amendments to the ADEA, Bell amended its plan to remove the age sixty-five mandatory retirement age, it applied for and received a favorable determination letter dated July 11, 1979 from the IRS to the effect that the plan, as amended, was in compliance with § 401, et. seq., of the code, including section 411. As the district court correctly noted, the IRS determination letter was not binding on the Department of Labor, or conclusive of the issue before us, but it certainly added support and legitimacy to the reasonableness of AT&T's proposal, its own view of that matter and its (and Bell's) reliance upon the rule-making process. It is wholly inconsistent to argue on the one hand that § 411(a)(3)(B) was so clear that employers were at peril

if they failed to act, and, on the other hand, to argue that it is understandable if the IRS, one of the three agencies charged with supervision, could not correctly interpret and apply the law to plans which relied, on their face, on interchange arrangements with other companies.

Fifth, Caldwell's position, and the judgment of the district court, amounts to a conclusion that the pension plans of the entire nationwide AT&T system of companies were in violation of the bona fide executive exception for four years, from the date of the enactment of that exception in 1978, through January 1, 1982, when the relevant pension plan provisions were changed. Doubtless there were other employers in the country in a similar situation, or so one would glean from the comments published by the Department of Labor in its January 19, 1981 Notice of Final Regulations. Yet,

there is not an iota of evidence in this record or any authority shown to us by the parties, suggesting any enforcement or other action by either the EEOC, the Department of Labor, or the Internal Revenue Service which lends the slightest support to Caldwell's position. To the contrary, it appears evident that no enforcement or other actions were taken by any of those agencies until after employers had adequate opportunity to amend their plans following the effective date of the final regulations on January 1, 1982. We take that as further confirmation of the position that the relevant law on forfeitability was unclear in 1979, and the governing agencies knew it.

Finally, although Bell's own position in 1979 does not control the interpretation of the statute, it tends to support the view that the law was indeed in flux as to the relevant

definitions relating to nonforfeitability. It would have been simple for Bell to have amended its plan if the necessity was clear. In its case an "interchange company" definition was only a minuscule step (3 out of 37 companies in the AT&T system) from a "controlled group" of companies definition, and we assume that a combined plan was not critically different from reciprocal plans. The reasonableness of the interchange company proposal was manifest by the facts that the reciprocity of benefits program was inherently pro-employee, that it had been a part of the AT&T system for decades and had not been erected to evade the bona fide executive exception of the ADEA. In fact, no AT&T employee had ever had retirement benefits suspended because of reemployment with one of the three minority owned companies in the AT&T system. See Affidavit of Therese F.

Pick, Addendum to Answer Brief of Appellee and Brief in Chief of Cross-Appellant, Southwestern Bell Telephone Company at Tab 2, p.6. The record does not establish that AT&T or Bell stood to gain any advantage under the ADEA from relying on an interchange of benefits rather than a controlled group approach. As soon as the rule-making process was completed, effective January 1, 1982, the relevant plan provisions were amended to exclude the two remaining minority companies, thus confining the suspension of benefits provision to the controlled (80% or more owned) group of companies.

In summary, it is clear to us that the law on forfeitability under § 631(c)(1) was not settled on November 30, 1979. Under the circumstances of this case, we decline to hold Bell on November 30, 1979, to the technical exactitude of regulations which became effective on

January 1, 1982, and retroactively to disqualify its plan provision where none of the regulatory agencies have seen any reason to reach such a conclusion. It would subvert the intent of the rule-making process, and ignore the realities of the extremely broad powers given to and being exercised by the Department of Labor with respect to defining the scope of these nonforfeitability provisions. Accordingly, we reverse the judgment of the district court on this issue, and hold that Caldwell's retirement by Bell properly fell within the bona fide executive exception under the ADEA.

III

Because of our holding reversing the district court on the sole ground for liability in this case, we also reverse the award of attorney's fees to Caldwell, which is subject of a separate appeal by Bell, docket no. 88-1332.

Also because of our holding, it is unnecessary for us to address the remaining issues raised by the parties with the exception of Caldwell's contention that the district court erred when it denied him leave to amend his complaint. As to the issue we simply observe that the determination of whether to grant or deny leave to amend is within the discretion of the court and the court's decision relative to an amendment to subject to reversal only for abuse of that discretion. LeaseAmerica Corp. v. Eckel, 710 F.2d 1470, 1473 (10th Cir. 1983). We find no such abuse of discretion by the district court in this case.

Other issues raised by Caldwell, including his argument that the district court erred in dismissing Count II of his complaint, are without merit.

IV.

For the reasons stated in this opinion, we REVERSE the judgment of the district court that Bell violated the ADEA. We likewise reverse the award of damages and attorneys fees to Caldwell. We AFFIRM the rulings of the district court denying Caldwell leave to amend his complaint, holding that the January 1, 1979 amendment to Bell's pension plan was not a subterfuge to evade the purposes of the ADEA, and dismissing Count II of Caldwell's complaint.

ENTERED FOR THE COURT

Stephen H. Anderson
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

CARL P. CALDWELL,	)	[FILED
	)	U.S. Court of
Plaintiff-Appellant	)	Appeals
Cross/Appellee.	)	June 1, 1989
	)	Robert L.
v.	)	Hoecker, Clerk]
	)	
SOUTHWESTERN BELL	)	
TELEPHONE COMPANY,	)	No. 87-2647
	)	87-2711
Defendant-Appellee,	)	87-1332
Cross/Appellant.	)	

ORDER

Before HOLLOWAY, Chief Circuit Judge, MCKAY, LOGAN, SEYMOUR, MOORE, ANDERSON, TACHA, BALDOCK, BRORBY, EBEL, Circuit Judges, BROWN*, District Judge.

This matter comes on for consideration of appellant's petition for rehearing with suggestion for rehearing en banc in the captioned appeal.

Upon consideration whereof, the petition for rehearing is denied by the panel that rendered the decision.

In accordance with Rule 35(b), Federal Rules of Appellate Procedure, the petition for rehearing and suggestion for rehearing en banc were transmitted to all of the judges of the court in regular active service. No member of the panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Entered for the Court

ROBERT L. HOECKER, Clerk

*Honorable Wesley E. Brown, District Judge for the U.S. District Court for the District of Kansas, sitting by designation.

IN THE UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	Sept. 30, 1987
	)	Robert D. Dennis
v.	)	Clerk]
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	NO. CIV-81-114-T
	)	
	)	
Defendant.	)	

JUDGMENT

Pursuant to the Court's Memorandum Opinion and Order dated July 17, 1987, judgment is hereby entered in favor of the plaintiff, Carl P. Caldwell, and against the defendant, Southwestern Bell Telephone Company, in the amount of $322,386.39, together with costs and post-judgment interest at the rate of 7.22% per annum until paid.

This judgment is based on the following specific awards:

(1) $99,263.75 net, for back pay and

fringe benefits covering the period December 1, 1979, through February 28, 1982, after deduction of the total amount of pension and social security checks received by plaintiff and his family during that same period.

(2) $13,571.30 for lost social security benefits during the period March 1, 1982, to October 1, 1987.

(3) $29,148.79 for unpaid pension benefits to which he is entitled for the period March 1, 1982, to October 1, 1987.

(4) $46,046.87 as pre-judgment interest on items (1), (2) and (3).

(5) $49,330.11 for loss of social security benefits from date of judgment to life expectancies of plaintiff and his spouse, discounted to present value at 6% per annum.

(6) $85,025.57 for loss of pension benefits from date of judgment to

life expectancies of plaintiff and his spouse, discounted to present value at 6% per annum.

ENTERED this 30th day of September, 1987.

/s/ Ralph G. Thompson
UNITED STATED DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON 9-30-87

IN THE UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	Jan. 28, 1988
	)	Robert D. Dennis,
v.	)	Clerk]
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	CIV-81-114-T
	)	
	)	
Defendant.	)	

AMENDED JUDGMENT

The Judgment entered herein on September 30, 1987, is amended to include the following: Judgment is also entered in favor of the plaintiff, Carl P. Caldwell, and against the defendant, Southwestern Bell Telephone Company, in the amount of $161,193.19 for plaintiff's reasonable attorneys fee.

ENTERED this 28th day of January, 1988.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGEMENT DOCKET ON 1-28-88

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DIST OF OKLAHOMA

CARL P. CALDWELL,	)	
	)	[FILED
Plaintiff,	)	U.S. D. Ct.
	)	W.D. of Okla.
v.	)	July 17, 1987
	)	Robert D. Dennis
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	Clerk]
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

On January 27, 1987, a hearing was held in this case on the damages to be recovered by the plaintiff herein. At the hearing, the Court directed the parties to brief several issues, which follow, rather than to submit evidence on those issues at the hearing. The Court did hear testimony on the issue of the plaintiff's mitigation of damages. The Court's ruling on each issue which was briefed will be discussed in seriatim.

I.

MOTION TO VACATE DUE TO NEWLY DISCOVERED EVIDENCE

The plaintiff claims that the amendment to defendant's pension plan which cured its invalidity was not adopted until February 1, 1982. Thus, he concludes that making the amendment retroactive to January 1, 1982, is a violation of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. §1054(g)(1), because it effectively deprives him of accrued benefits under the plan. The plaintiff goes on to submit that the entire plan is thus invalid, and that he has still not been legally retired. The defendant responds that information as to the date of the amendment was available to plaintiff as early as September of 1982, and cannot be used by him at this point as grounds for vacating the Court's Order of May 22, 1986.

The Court agrees with defendant that the validity of the entire plan should not at this point be questioned because

of the retroactive amendment. However, there is no reason why the plan should be applied in a way so as to deprive plaintiff of benefits accrued at the time the amendment was adopted. Therefore, the Court will consider February 28, 1982, as the first date on which plaintiff could have been legally retired for the purposes of computing the damage award herein. The Court has chosen February 28, 1982, rather than February 1, 1982, as the applicable date because by company policy plaintiff could not be retired until the last day of the month.

II.

DEDUCTION OF SOCIAL SECURITY BENEFITS RECEIVED

The plaintiff contends that social security benefits should not be deducted from the award of back pay because such payments are collateral source benefits citing EEOC v. Sandia Corp., 639 F.2d 600 (10th Cir. 1980) (district court did not

abuse its discretion by refusing to deduct unemployment compensation from ADEA back pay award). The defendant contends that social security benefits received by plaintiff and his family for the period between November 30, 1979, and February 28, 1982, should be deducted from the back pay award. Defendant cites the case of EEOC v. Wyoming Retirement System, 771 F.2d 1425, 1431 (10th Cir. 1985), as authority for its position. Although the court in Wyoming Retirement referred to the burden on the public treasury if social security benefits were not deducted in that case, it also held that deduction of collateral source income from a back pay award is a matter within the trial court's discretion. Plaintiff herein would not have received the social security benefits had he continued working for the defendant and he will still be made whole even if his damage award is reduced to the extent of

the social security payments. Thus, consistent with this Court's prior ruling regarding offset of pension benefits, plaintiff's back pay award will be reduced by the amount of social security benefits received during the period from November 30, 1979, to February 28, 1982.

III.

LOSS OF SOCIAL SECURITY BENEFITS BY EARLY FORCED RETIREMENT

The plaintiff also contends that because he was forced to retire at age 65 as of November 30, 1979, he will receive social security benefits based upon a smaller figure than that applicable on February 28, 1982. The defendant refers to this as a deferred retirement premium. The Court agrees with the plaintiff in that his entitlement to social security benefits should be determined on the date on which he could have first been legally retired: February 28, 1982. Because the social

security benefits themselves cannot be adjusted, the plaintiff is entitled to receive the difference between the benefits he receives based upon the early forced retirement date of November 30, 1979, and the amount of benefits he would have received had the benefits been calculated as of the proper retirement date, February 28, 1982. The Court finds that the plaintiff is entitled to receive this difference in benefits for the period from February 28, 1982, through the date of his life expectancy as provided by actuarial tables and as stipulated by the parties. The total enhanced future payments (those which will accrue after judgment herein) should be discounted to present value if they are paid in a lump sum.

IV.

INCREASE IN PENSION BENEFITS DUE TO EARLY FORCED RETIREMENT

The plaintiff contends that because he

could not be legally retired until February 28, 1982, his pension rights should be based on his entitlement as of that date. He explains that because of his monthly pension is figured on his base salary and length of service as of the date when he was forcibly retired, November 30, 1979, he is entitled to an increase in pension benefits based on the later date of February 28, 1982. In opposition, the defendant contends that under the Bell System Management Pension Plan, the benefits are determined as of the normal retirement age, which is age 65. Plaintiff counters that freezing benefits at age 65, with regard to an employee who continues to work past that age, is in and of itself a discriminatory act violative of the ADEA. However, a bona fide employee benefit plan which "freezes" pension benefits at age 65 is expressly permitted under the ADEA. 29 U.S.C. §623(f)(2), 29 C.F.R. §860.120

(1986). Because the amendment sets benefits at the normal retirement age, the plaintiff is not entitled to receive any greater benefits than had he remained in employment with the defendant until the proper retirement date, February 28, 1982. Plaintiff's request for an increase in his pension benefits due to his early forced retirement is, therefore, denied.

V.

TAXATION OF SOCIAL SECURITY BENEFITS AWARDED

The plaintiff contends that the judgment herein should include an amount to compensate him for taxes he will incur as a consequence of receiving enhanced social security benefits as part of a damage award rather than as nontaxable payments from the Social Security Administration. Plaintiff distinguishes Blim v. Western Electric Company, Inc., 731 F.2d 1473 (10th Cir.

1984). In Blim, the Court did not allow an award based on increased tax liability created by the receipt of damages in a lump sum because the tax loss to be suffered by the plaintiffs therein could be eliminated through provisions allowing for five-year averaging under the Internal Revenue Code. Because the plaintiffs would suffer no significant tax penalty, the Blim court held that it was error for the district court to award damages to the plaintiffs to cover such increased tax liability.

In the instant case, the plaintiff has failed to provide the Court with evidence as to the extent of his tax liability in the event enhanced social security benefits are awarded in a lump sum. As the defendant points out, there is no evidence before the Court of the plaintiff's financial condition, including the tax bracket applicable to the plaintiff. The only "evidence"

before the Court is an exhibit attached to the plaintiff's brief on the damages issue which purports to delineate unsubstantiated figures for the damage period. Furthermore, Congress has recently changed its policy regarding the taxability of social security payments rendering any award intended to compensate for taxation even more speculative. Therefore, the Court is not inclined to include in the damages award an amount for additional income tax liability and the plaintiff's request for damages to defray his alleged future income tax liability is denied.

VI.

PRE-JUDGMENT INTEREST ON THE JUDGMENT

It was held in Blim v. Western Electric Company, Inc., supra, that age discrimination victims who receive liquidated damages are not also entitled to an award of pre-judgment interest, citing the United States Supreme Court

case of Brooklyn Bank v. O'Neil, 324 U.S. 697 (1945). In this Court's Order of May 22, 1986, it was determined that this defendant's violations of the ADEA were not willful and that liquidated damages were thus inappropriate. Therefore, the Court finds Blim, supra, inapposite and finds plaintiff is entitled to pre-judgment interest for the defendant's use and retention of pay and other benefits to which it has been determined he is entitled. It appears that the defendant has stipulated that the applicable pre-judgemnt interest rate is 6%, and appears not to dispute the fact that case law supports the award of pre-judgment interest if liquidated damages are not awarded.

Therefore, the Court finds that pre-judgment interest shall be allowed and that this interest shall be calculated on the net judgment amount from November 30, 1979, through February

28, 1982. The net judgment amount includes the amount of money which the plaintiff has actually been without. In otherwords, amounts which the plaintiff actually received, such as pension funds and social security payments, shall not be included in calculating pre-judgment interest. As the figure of 6% is agreed to be appropriate, the calculation for pre-judgment interest shall be determined by multiplying .000164, the daily rate using 6% per annum, times the total amount of judgment determined to be appropriate, to determine the amount of interest per day; this per day dollar figure shall then be taken times the number of days that plaintiff lost the use of his money and benefits. The applicable period shall run from December 1, 1979, to the date of judgment.

VII.

OFFSET FOR FAILURE TO MITIGATE

Defendant urges that a further reduction of plaintiff's back pay award is appropriate for sums plaintiff could have earned between November 30, 1979, and February 28, 1982. The defendant has offered expert testimony as to plaintiff's employment opportunities during this time period. The Court did not find this testimony, however, to be persuasive. The expert's conclusions were speculative and not well supported by the facts, even as reconstructed by defendant. Plaintiff was 65 years of age at the time of his separation from Southwestern Bell. He had worked for Bell approximately 44 years. Plaintiff's testimony was that his social security benefits would have been jeopardized had he taken another job. Furthermore, plaintiff's back pay award is being offset by these social security benefits. Thus, defendant should not be heard at

this time to complain about plaintiff's decision to rely on his social security benefits rather than to actively seek new employment. It is the defendant's burden to show that plaintiff did not use reasonable effort to mitigate his damages. E.E.O.C. v. Sandia Corp., 639 F.2d 600, 627 (10th Cir. 1980). Defendant has not met this burden. Therefore, there will be no offset for plaintiff's alleged failure to mitigate his damages by seeking other employment.

VIII.

CONCLUSION

It appears to the Court that with the guidance provided by this and previous orders, the parties should be able at this point to reach a stipulation as to the amount of damages to which plaintiff is entitled. The elements of the damage award should include plaintiff's salary plus fringe benefits offset by pension and social security benefits received,

payment for loss of social security benefits due to plaintiff's early forced retirement, and pre-judgment interest at the rate of 6% per annum on the net judgment amount from December 1, 1979, through the date of judgment. The parties are hereby ordered to confer in good faith in an attempt to present to the Court a stipulated form of judgment. In the event the parties are unable to agree within thirty (30) days from the date hereof, each party is to submit to the Court its version of the proposed form of judgment, together with a motion explaining in detail the points on which the parties disagree. Before filing any such motion, the parties are cautioned to be mindful of the responsibilities imposed by Rule 11 of the Federal Rules of Civil Procedure.

IT IS SO ORDERED this 16th day of July, 1987.

/s/ Ralph G. Thompson
UNITED STATES DIST JUDGE

IN THE UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL Plaintiff, vs. SOUTHWESTERN BELL TELEPHONE COMPANY, Defendant.	)	[FILED U.S. District Ct. May 22, 1986 Robert D. Dennis Clerk] NO. CIV-81-114-T

MEMORANDUM OPINION AND ORDER

On January 30, 1986, the Court heard oral argument on various pending motions in this case. The parties outlined the issues within these various motions which were most relevant, and the Court now addresses each of these issues in that form, with less emphasis being placed on each motion filed.

I. TIMELINESS - LIMITATIONS ISSUE

Defendant has alleged that plaintiff failed to timely file his charge of

discrimination pursuant to 29 U.S.C. §621 et seq. and asks the Court to dismiss the action. Defendant claims that the case of Delaware State College et al. v. Ricks, 449 U.S. 250 (1980) is controlling and should be applied retroactively to this case. Ricks held that the significant point in time triggering the 180 day period for filing an EEOC claim is the date at which a plaintiff was informed of the decision to terminate his employment. Plaintiff argues that Ricks should not be applied retroactively to this case. However, if Ricks should be applied to this case, plaintiff has contended that his claim was timely filed because it was brought within 180 days of the date the defendant's Benefits Committee informed him of their vote to retire him. The Court finds that date to be the date the defendant made its "official position" known to plaintiff. In Ricks, the Supreme Court places

importance on the date of the Board's "official position". The Court makes no determination as to whether Ricks should be retroactively applied. Ricks supra, at 261. It is the Court's opinion however that whether Ricks is applicable, or whether pre-Ricks law applies, plaintiff's claim was timely filed. See Payne v. Crane Co., 560 F.2d 198 (5th Cir. 1977). Defendant's Motion for Judgment on the Pleadings, to Vacate and Dismiss are therefore without merit and are denied. Additionally, the first requested amendment to plaintiff's motion to amend is overruled.

II. DAMAGES - EXTENT OF LIABILITY

At the time of plaintiff's discharge, defendant's retirement plan in effect for plaintiff was not a nonforfeitable plan as required under 29 U.S.C. §631(C)(1). See this Court's Order of August 20, 1982. However, the defendant amended the retirement plan to become non-forfeitable

effective January 1, 1982. Under those circumstances, if plaintiff had remained in employment until January 1, 1982, he would have lost the protection of the Act at that time and would have been subject to retirement then, when plan was cured. Therefore, had he remained, the greatest expectation of benefits would have been full salary until the date of the revision of the plan, unless it could be assumed defendant would have extended his employment.

The plaintiff contends that even if the pension plan was amended to eliminate its forfeitability provision, defendant still failed to comply with the other conditions precedent found in §631(c)(1): (1) that he must be a bona fide executive, and (2) that he must have held that position for the two years immediately preceding his termination. Therefore, plaintiff contends his termination was unlawful and that

damages for the period from November 30, 1979 to January 1, 1982, are inadequate.

On August 20, 1982, this Court, without a factual discussion, denied defendant's motion for summary judgment on the issue of the bona fide executive issue. It appears to the Court now that that ruling was improper, and that the executive issue is proper for a summary judgment ruling.

The definition of "employee employed in a bona fide executive" capacity is found at 29 CFR §541.1, cross-referenced from 29 CFR §1625.12. The definition contained therein unmistakably applies to the plaintiff based upon the facts which are contained in the record. As General Accounting Manager, plaintiff was department head of the accounting department for Oklahoma. He was considered by defendant to be at the fifth management level which was the highest level of management of the

department heads in Oklahoma. Management levels three and four, as well as all 441 employees in the department, reported directly to him. Based upon the job description, written by plaintiff himself, he exerted wide discretion in administering and deciding where to utilize personnel most effectively and productively. He was also responsible for selection, training and monitoring the progress of all management employees. Based upon these undisputed facts, as a matter of law, plaintiff's job fell within the "bona fide executive" exception of the ADEA.

The remaining condition precedent in §631(C)(1), the two year requirement, is not, in the opinion of this Court, a requirement which should be read so literally and mechanically that the legislative purpose of §631(C)(1) is overlooked. The two-year requirement was added "to prevent an employer from

circumventing the law by appointing an employee to a bona fide executive or high policymaking position shortly before retirement in order to permit compulsory retirement of that employee...." United States Code Cong. & Admin. News, 95th Cong. 2nd Session, p. 530 (1978). It is undisputed in this case that plaintiff had held the same position since 1964, a great deal longer than two years. Although the retirement of plaintiff was unlawful, due to the retirement plan then in existence, the defendant corrected the situation by revising the plan effective January 1, 1982. At that point, the only remaining "flaw" in the plaintiff's retirement was the fact that he had not been employed two years immediately prior to that date. Assuming plaintiff is paid his regular salary for the period of time from his termination to January 1, 1982, he can be said to have received what he would have received

if his employment had continued until January 1, 1982. The revision of the retirement plan, therefore, had the effect of extending plaintiff's employment to the two-year period immediately preceding the effective date of the plan's revision, i.e., the effective date of his retirement. This result entitles the plaintiff to receive the protections which this Court finds were intended under the ADEA. He can be protected only until the effective date of the plan's revision, as he had no expectation of employment beyond that date. If a plaintiff is made whole, he is fully compensated. The extend of his measure of damages, therefore, is the period of time from November 30, 1979 to January 1, 1982.

The Court's resolution of the above issues renders moot the third requested amendment to plaintiff's motion to amend.

III. SUMMARY JUDGMENT: WILLINGFULNESS

AND LIQUIDATED DAMAGES

The parties have filed cross motions for partial summary judgement on the issue of defendant's alleged willful violation on the ADEA. Willful violations of the ADEA can subject employers to liquidate damages under 29 U.S.C. §626(b). Both parties have agreed that the "reckless disregard" standard in the case of TWA v. Thurston, 469 U.S. _____ (1985) is the applicable standard. Having carefully considered the steps taken by defendant to determine the validity of its retirement plan after the 1978 amendments of the ADEA, the Court finds that defendant's actions fall short of reckless disregard. Although the Court cannot say that its reliance upon communications from the IRS and Department of Labor, or the ERISA definition of forfeitable was well placed, it does not appear to have been done in bad faith. For that reason,

plaintiff is not entitled to liquidated damages.

IV. SETOFF OF PENSION PLAN BENEFITS FROM BACK PAY AWARD

An issue which bears directly on the measure of damages is the issue of whether plaintiff is required to deduct the pension payments he has been receiving from the salary he will receive. This issue is presented in plaintiff's motion to amend.

The defendant contends that plaintiff is not entitled to receive full salary plus pension payments received in the interim and cites E.E.O.C. v. Wyoming Retirement System, 771 F.2d 1425 (10th Cir. 1985) as authority. In that case the Court upheld the trial court's deduction of social security payments from a back pay award. The Court noted that the claimants would still be made whole even if the benefits were deducted. The plaintiff argues that the case is

distinguishable because the payments deducted were social security payments, or tax funds, which is not the case here.

The deduction of collateral sources of income from a back pay award is within the trial court's discretion. E.E.O.C. v. Wyoming Retirement System, 771 F.2d at 1431. Although the nature of the payments received by Mr. Caldwell are different from those in the above cited case, the issue which is important here was also found to be important in that case: the benefits would not have been received if his employment had continued and he can still be made whole even with the deduction. Id. at 1431. The purposes of the ADEA are thus fulfilled. It is therefore ordered that the back pay award to be received by plaintiff herein will be reduced by the amount of pension payments he has received.

Accordingly, it is ordered that plaintiff's motion to amend complaint is

denied as to the first and second requested amendments, and the third requested amendment is rendered moot. Defendant's motion for judgment on the pleadings, to vacate and to dismiss is overruled. Plaintiff's first motion for partial summary judgment is overruled and defendant's cross motion for partial summary judgment is granted. Plaintiff's second motion for partial summary judgment is granted. Plaintiff's second motion for partial summary judgment on the issue of willfulness and liquidated damages is overruled and defendant's cross motion for partial summary judgment on that issue is granted.

IT IS SO ORDERED this 22nd day of May, 1986.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET ON MAY 22, 1986

IN THE UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	August 20, 1982
	)	Herbert T. Hope
vs.	)	Clerk]
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	NO. CIV-81-114-T
	)	
Defendant.	)	

MEMORANDUM OPINION AND ORDER

This action is before the Court for consideration of plaintiff's Motion for Partial Summary Judgment and defendant's Motion for Summary Judgment. The parties have fully briefed the issues presented by the motions.

On November 30, 1979, plaintiff was retired by defendant, at age 65, pursuant to Section 12(c)(1) of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §631(c)(1). Plaintiff commenced this action for damages

alleging that his termination was unlawful. Defendant has moved for summary judgment asserting that plaintiff was a bona fide executive pursuant to §12(c)(1) and that his forced retirement was therefore permissible under the ADEA. Plaintiff has moved for summary judgment, as to liability only, asserting that the pension he received upon his retirement was forfeitable in contradiction to the requirements of §12(c)(1) with the result that his forced retirement at age 65 was unlawful. Defendant has responded that the pension was nonforfeitable and that it is therefore entitled to the summary judgment it seeks.

Section 12(c)(1) of the ADEA provides as follows:

> "Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age, but not seventy years of age, and who, for the 2-year period immediately before retirement, is employed in a bona

> fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

At the time of plaintiff's retirement, Section 4.6 of the defendant's Plan for Employees' Pensions, Disability Benefits and Death Benefits provided, in part, that:

> "Regular employment with this company or with any company with which arrangements for interchange of benefit obligations, as described in Section 9 of these Regulations, have been made directly or indirectly, shall suspend the right of a retired employee or person receiving a deferred vested pension to pension payments during the period he continues in such employment..."

Plaintiff argues that the pension plan under which he was retired was maintained solely by the defendant. Thus, plaintiff contends, his pension was not "nonforfeitable" as required by the ADEA

for the reason that his pension would have been suspended (and thereby "forfeited" pursuant to 29 C.F.R. §1625.12(k)(1)) under the terms of the plan if he had commenced employment with any company with which defendant had made arrangements for an interchange of benefit obligations.

In response, defendant argues that 29 C.F.R. §1625.12(k)(1) provides that a pension plan is not forfeitable under the ADEA if its benefits may be suspended for any reason permitted under 26 U.S.C. §411(a)(3). Defendant contends that 26 U.S.C. §411(a)(3)(B) permits a suspension of benefits if the plaintiff is employed, after retirement, by the employer who maintains the plan under which retirement benefits are being paid. Defendant further argues that it is necessary to examine the necessary definitions applicable to §411, contained in 26 U.S.C. §414(b), which provides that

"all employees of all corporations which are members of a controlled group of corporations ... shall be treated as employed by a single employer." Defendant generally argues that the companies with which it had arranged for an interchange of retirement benefits are members of a controlled group of corporations and therefore the interchange agreements did not make the plaintiff's pension benefits forfeitable under the provisions of the ADEA.

The defendant's argument recognizes that a "controlled group of corporations" is generally defined by 26 U.S.C. §1563(a) as being an 80 percent control test. See, 26 C.F.R. §1.1563-1. Further, defendant recognizes that three companies with whom it had arranged for an interchange of retirement benefits, Cincinnati Bell, Inc., (Cincinnati), Southern New England Telephone Company (SNET), and Rochester Telephone

(Rochester), did not qualify as members of the controlled group of corporations at the time of plaintiff's retirement. Defendant argues that this deficiency in its pension plan has been cured by eliminating the suspension of pension benefits upon employment by Cincinnati or SNET. This amendment was effective on January 1, 1982.[1]

Further, defendant argues that plaintiff received his pension benefits and was not employed by Cincinnati, SNET or Rochester prior to the effective date of the amendments so that any issue of forfeitability prior to January 1, 1982 is moot. Defendant's argument regarding

---

[1] Rochester ceased its participation in the interchange agreement on December 31, 1979, one month after plaintiff was forceably retired. Retired employees of the defendant have not been subject to a suspension of retirement benefit upon employment by Rochester since January 1, 1980.

mootness relies primarily upon DeFunis v. Odegaard, 416 U.S. 312 (1974).

The Court cannot accept the defendant's position that "no issue of forfeitability exists prior to January 1, 1982 since plaintiff admittedly was not reemployed by Rochester, Cincinnati or SNET and admittedly received his pension." On November 30, 1979, the defendant forceably retired Carl P. Caldwell for the single reason that he was sixty-five years of age. The determination to terminate plaintiff's employment was made without any regard to his performance as an employee. Congress has stated that such a determination may be the basis for an involuntary retirement if certain statutory prerequisites are met. One of these statutory conditions is that the retirement benefits available to the terminated executive, between the ages of 65 and 70, must be nonforfeitable at the

time of his retirement. Defendant now concedes that its interchange agreements with Rochester, SNET and Cincinnati created a possibility of forfeiture of the plaintiff's pension benefits, but claims that plaintiff was not harmed because he chose not to forfeit those benefits. The defendant's argument simply misses its mark. The mere existence of the possibility for a non-permissible forfeiture renders the plaintiff's pension benefits as forfeitable. By choosing the word "forfeitable," Congress imposed a requirement of certainty in the pension benefits of executives subject to early retirement. It did not require those executives who were forced from their jobs before attaining the age of 70 to actually endure a forfeiture of their pension in an attempt to establish that their early retirement was a violation of the ADEA. In this case, the plaintiff

was entitled to continued employment until such time as the defendant was able to satisfy the conditions precedent to an involuntary termination upon the basis of his age alone. The defendant's failure to satisfy those conditions renders the involuntary retirement of plaintiff a violation of the requirements of the ADEA and the plaintiff is entitled to recover for such a violation of this statute.

Defendant also states that the Internal Revenue Service determined that the pension plan provided to plaintiff was a qualified plan under the provisions of the Internal Revenue Code of 1954. Thus, defendant argues, plaintiff's attack upon the forfeitability of his pension is an impermissible collateral attack upon the IRS's determination that the pension is nonforfeitable. Defendant contends that plaintiff should be collaterally estopped to mount such an attack upon a valid administrative

determination. In support of this position defendant cites McCulloch Interstate Gas Corp. v. F.P.C., 536 F.2d 910 (10th Cir. 1976), and United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966).

In Utah Construction, supra, the Supreme Court set forth the general principles of collateral estoppel by stating:

> "When an administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply res judicata to enforce repose." 384 U.S. at 422.

Additionally, the Tenth Circuit discussed collateral estoppel in McCulloch Interstate Gas Corp., supra., and stated, "A party may not attack the validity of a prior agency order in a subsequent proceeding." 536 F.2d at 913.

The IRS determination that defendant's pension plan was a qualified plan was not

reached as a result of the IRS acting in a judicial capacity. Rather, the determination was issued upon the defendant's request for such a determination and was based upon information supplied to the IRS. The IRS limited its determination to a consideration of the plan under the provisions of the Internal Revenue Code. The IRS advised that its ruling was "not a determination regarding the effect of other federal or local statutes." Finally, the plaintiff was not a party to the IRS determination. While the defendant notified all plan participants that the plan had been amended and a determination of the qualified status of the amended plan would be sought from the IRS, defendant makes no suggestion that plaintiff chose to intervene, as a party or otherwise, in the determination. Moreover, while the defendant is entitled to rely upon the determination that its

pension plan was qualified for certain tax treatments, such a determination is subject to revision by the IRS upon the discovery of additional information. See, 26 C.F.R. §§601.201(m) and (1)(4).

Inasmuch as plaintiff's retirement benefits were subject to a possible and impermissible forfeiture under the ADEA at the time of his forced retirement, his involuntary retirement at age 65 pursuant to §12(c)(1) of the ADEA was unlawful. Plaintiff is entitled to judgment as a matter of law upon the issue of the defendant's liability and plaintiff's motion for partial summary judgment is hereby granted. Accordingly, this action will be tried upon the issue of damages only. Defendant's motion for summary judgment is hereby denied. Plaintiff's motion to amend is hereby denied as moot.

IT IS SO ORDERED this 20th day of August, 1982.

/s/ Ralph G. Thompson
UNITED STATES DISTRICT JUDGE

Entered in judgment docket
August 20, 1982

UNITED STATES CONSTITUTION,

AMENDMENT VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

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5 U.S.C., APP. 1.

REORGANIZATION PLAN NO. 1 OF 1978

43 F.R. 19807, 92 Stat. 3781

* * *

EQUAL EMPLOYMENT OPPORTUNITY

* * *

Section 2. Transfer of Age Discrimination Enforcement Functions

All functions vested in the Secretary of Labor or * * * (29 U.S.C. 621, 623,

626, 627, 628, 629, 630, 631, 632, 633,, and 633a) * * * are hereby transferred to the Equal Employment Opportunity Commission. All functions related to age discrimination administration and enforcement pursuant to * * * (29 U.S.C. 625 and 634) * * * are hereby transferred to the Equal Employment Opportunity Commission.

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5 U.S.C., APP. 1.

REORGANIZATION PLAN NO. 4 OF 1978

43 F.R. 47713, 92 Stat. 3790

* * *

Section 101. Transfer to the Secretary of the Treasury.

* * * all authority of the Secretary of Labor to issue the following described documents pursuant to the statutes hereinafter specified is hereby

transferred to the Secretary of the Treasury;

(a) regulations, rulings, opinions, variances and waivers under * * * [section 1051 et seq. of Title 29] * * *

EXCEPT for sections * * * [* * * 1053(a)(3)(B), * * * of Title 29];

(b) such regulations, rulings, and opinions which are granted to the Secretary of Labor under * * [sections * * * 411, * * * of Title 26], * * *

EXCEPT for * * * [section 411(a)(3)(B) of Title 26] * * *

SELECTIVE PORTIONS OF THE INTERNAL REVENUE CODE

26 U.S.C. §411(a)(3)(B)

(3) **Certain permitted forfeitures, suspensions, etc.**--For purposes of this subsection--

* * *

(B) Suspension of benefits upon reemployment of retiree.--A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such period as the employee is employed, subsequent to the commencement of payment of such benefits--

(i) in the case of a plan other than a multiemployer plan, by the employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, the same trade or craft, and the same geographic area covered by the plan as when such benefits commenced.

The Secretary of Labor shall prescribe such regulations as may be

necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

---

26 U.S.C. §414(b)

(b) **Employees of controlled group of corporations.**--For purposes of sections 401, 408(k), 410, 411, 415, and 416, all employees of all corporations which are members of a controlled group of corporations (within the meaning of section 1563(a), determined without regard to section 1563(a)(4) and (e)(3)(C) shall be treated as employed by a single employer. With respect to a plan adopted by more than one such corporation, the applicable limitations provided by section 404(a) shall be determined as if all such employers were a single employer, and allocated to each employer in accordance with regulations

prescribed by the Secretary.

---

26 U.S.C. §1563(a)(1)

(a) Controlled group of corporations.--For purposes of this part, the term "controlled group of corporations" means any group of--

(1) **Parent-subsidiary controlled group.**--One or more chains of corporations connected through stock ownership with a common parent corporation if--

(A) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of each of the corporatons, except the common parent corporation, is owned (within the meaning of subsection (d)(1)) by one or more

of the other corporations; and

(B) the common parent corporation owns (within the meaning of subsection (d)(1)) stock possessing at least 80 percent of the total combined voting power of all classes of stock entitled to vote or at least 80 percent of the total value of shares of all classes of stock of at least one of the other corporations, excluding, in computing such voting power or value, stock owned directly by such other corporations.

SELECTIVE PORTIONS OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

29 U.S.C. §621

Congressional statement of findings and

purpose

(a) The Congress hereby finds and declares that--

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employemnt, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. §623(a)(1)

It shall be unlawful for an employer--

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

29 U.S.C. §623(f)(2)

It shall not be unlawful for an employer, employment agency, or labor organization--

* * *

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual;

29 U.S.C. §626(c)(2)

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

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29 U.S.C. §628

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Equal Employment Opportunity Commission may issue such rules and regulations as it may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as it may find necessary and proper in the public interest.

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29 U.S.C. §631(a)

(a) Individuals at least 40 but less than 70 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

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29 U.S.C. §631(c)(1)

(c) Bona fide executives or high policymakers

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings,

or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

SELECTIVE PORTION OF THE EMPLOYMENT RETIREMENT INCOME SECURITY ACT

29 U.S.C. §1002(19)

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan

contains a provision described in section 1053(a)(3) of this title.

---

29 U.S.C. § 1053(a)(3)(B)

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age * * *.

* * *

(3)(A)

* * *

(B) A right to an accrued benefit derived from employer contributions shall not be treated as forfeitable solely because the plan provides that the payment of benefits is suspended for such periods as the employee is employed, subsequent to the commencement of payment of such

benefits--

(i) in the case of a plan other than a multiemployer plan, by an employer who maintains the plan under which such benefits were being paid; and

(ii) in the case of a multiemployer plan, in the same industry, in the same trade or craft, and the same geographic area covered by the plan, as when such benefits commenced.

The Secretary shall prescribe such regulations as may be necessary to carry out the purposes of this subparagraph, including regulations with respect to the meaning of the term "employed".

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29 U.S.C. §1060(a)(2)

(a) Plan maintained by more than one

employer

Notwithstanding any other provision of this part or part 3, the following provisions of this subsection shall apply to a plan maintained by more than one employer:

* * *

(2) Sections 1053 and 1054 of this title shall be applied as if all such employers constituted a single employer, except that the application of any rules with respect to breaks in service shall be made under regulations prescribed by the Secretary.

---

29 U.S.C. §1060(c)

(c) Plan maintained by controlled group of corporations

For purposes of sections * * * 1053 * * * of this title, all employees of all corporations which are members of a

controlled group of corporations (within the meaning of section 1563(a) of Title 26 * * * shall be treated as employed by a single employer. * * *.

---

29 U.S.C. §1102(b)(3)

(b) Requisite features of plan

Every employee benefit plan shall--

* * *

(3) provide a procedure for amending such plan, and for identifying the persons who have authority to amend the plan * * *

---

29 U.S.C. §1104(a)(1)(D)

(a) Prudent man standard of care

* * *

(1) * * * a fiduciary shall discharge his duties with respect to a plan solely in the interst of the participants and

beneficiaries and--

* * *

(D) in accordance with the documents and instruments governing the plan * * * .

SELECTIVE PORTIONS OF THE FEDERAL RULES OF CIVIL PROCEDURE

Rule 15(a), F.R.Civ.P.

Amended and Supplemental Pleadings

(a) Amendments. * * * a party may amend the party's pleading only by leave of court * * *

Rule 38(a) & (b), F.R.Civ.P.

Jury Trial of Right

(a) Right Preserved. The right of

trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(b) **Demand.** Any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action * * * Such demand may be indorsed upon a pleading of the party.

Rule 56(c), F.R.Civ.P.

Summary Judgment

* * *

(c) Motion and Proceeding Thereon. * * * The judgment sought shall be rendered forthwith if * * * there is no genuine issue as to any material fact * * *.

---

26 C.F.R. §1.411(a)-4

[IRS REGULATIONS §1.411(a)-4]

§1.411(a)-4 Forfeitures, suspensions, etc

(a) **Nonforfeitability.** Certain rights in an accrued benefit must be nonforfeitable to satisfy the requirements of section 411(a). This section defines the term "nonforfeitable" for purposes of these requirements. For purposes of section 411 and the

regulations thereunder, a right to an accrued benefit is considered to be nonforfeitable at a particular time if, at that time and thereafter, it is an unconditional right. Except as provided by paragraph (b) of this section, a right which, at a particular time, is conditioned under the plan upon a subsequent event, subsequent performance, or subsequent forbearance which will cause the loss of such right is a forfeitable right at that time.

* * *

(b) Special rules. For purposes of paragraph (a) of this section a right is not treated as forfeitable--

* * *

(2) Suspension of benefits upon reemployment of retiree. In the case of certain suspensions of benefits under section 411(a)(3)(B), see regulations prescribed by the Secretary of Labor under 20 CFR part 2530 (Department of

Labor regulations relating to minimum standards for employee pension benefit plans).

[DEPARTMENT OF LABOR REGULATION]

29 C.F.R. §541.1

§541.1 Executive.

The term "employee employed in a bona fide executive * * * capacity" in section 13(a)(1) of the act shall mean any employee:

(a) Whose primary duty consists of the management of the enterprise in which he is employed or of a customarily recognized department of subdivision thereof; and

(b) Who customarily and regularly directs the work of two or more other employees therein; and

(c) Who has the authority to hire or fire other employees ow [sic] whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion or any other change of status of other employees will be given particular weight; and

(d) Who customarily and regularly exercises discretionary powers; and

(e) Who does not devote more than 20 percent, or, in the case of an employee of a retail or service establishment who does not devote as much as 40 percent, of his hours of work in the workweek to activities which are not directly and closely related to the performance of the work described in paragraphs (a) through (d) of this section: Provided, That this paragraph shall not apply in the case of an establishment or a physically separated branch establishment, or who owns at least a 20-percent interest in the enterprise in which he is employed;

* * *

[**DEPARTMENT OF LABOR REGULATION**]

29 C.F.R. §860.120(c)

* * *

(c) *"To observe the terms" of a plan.*

* * *

Where a discriminatory policy is an express term of a benefit plan, employees presumably have some opportunity to know of the policy and to plan (or protest) accordingly. Moreover, the requirement that the discrimination actually be prescribed by a plan assures that the particular plan provision will be equally applied to all employees of the same age. Where a discriminatory provision is an optional term of the plan, it permits individual, discretionary acts of discrimination, which do not fall within the section 4(f)(2) exception.

[EEOC REGULATION]

29 C.F.R. §1625.12

§1625.12 Exemption for bona fide executive or high policymaking employees.

(a) Section 12(c)(1) of the Act, added by the 1978 amendments, provides: "Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such

employee which equals, in the aggregate, at least $27,000.

(b) Since this provision is an exemption from the non-discrimination requirements of the Act, the burden is on the one seeking to invoke the exemption to show that every element has been clearly and unmistakably met. Moreover, as with other exemptions from the Act, this exemption must be narrowly construed.

(c) An employee within the exemption can lawfully be forced to retire on account of age at age 65 or above. In addition, the employer is free to retain such employees, either in the same position or status or in a different position or status. For example, an employee who falls within the exemption may be offered a position of lesser status or a part-time position. An employee who accepts such a new status or position, however, may not be treated any

less favorably, on account of age, than any similarly situated younger employee.

(d)(1) In order for an employee to qualify as a "bona fide executive," the employer must initially show that the employee satisfies the definition of a bona fide executive set forth in §541.1 of this chapter. Each of the requirements in paragraphs (a) through (e) of §541.1 must be satisfied, regardless of the level of the employee's salary of compensation.

(2) Even if an employee qualifies as an executive under the definition in §541.1 of this chapter, the exemption from the ADEA may not be claimed unless the employee also meets the further criteria specified in the conference Committee Report in the form of examples (see H.R. Rept. No. 95-950, p. 9). The examples are intended to make clear that the exemption does not apply to middle-management employees, no matter

how great their retirement income, but only to a very few top level employees who exercise substantial executive authority over a significant number of employees and a large volume of business. As stated in the Conference Report (H.R. Rept. No. 95-950, p. 9):

Typically the head of a significant and substantial local or regional operation of a corporation [or other business organization], such as a major production facility or retail establishment, but not the head of a minor branch, warehouse or retail store, would be covered by the terms "bona fide executive." Individuals at higher levels in the corporate organizational structure who possess comparable or greater levels of responsibility and authority as measured by established and recognized criteria would also be covered.

The heads of major departments or divisions of corporations [or other

business organizations] are usually located at corporate or regional headquarters. With respect to employees whose duties are associated with corporate headquarters operations, such as finance, marketing, legal, production and manufacturing (or in a corporation organized on a product line basis, the management of product lines), the definition would cover employees who head those divisions.

In a large organization the immediate subordinates of the heads of these divisions sometimes also exercise executive authority, within the meaning of this exemption. The conference intend the definition to cover such employees if they possess responsibility which is comparable to or greater than that possessed by the head of a significant and substantial local operation who meets the definition.

(e) The phrase "high policymaking

position," according to the Conference Report (H.R. Rept. No. 95-950, p. 10), is limited to "* * * certain top level employees who are not 'bona fide executives' * * *." Specifically, these are:

* * *individuals who have little or no line authority but whose position and responsibility are such that they play a significant role in the development of corporate policy and effectively recommend the implementation thereof.

For example, the chief economist or the chief research scientist of a corporation typically has little line authority. His duties would be primarily intellectual as opposed to executive or managerial. His responsibility would be to evaluate significant economic or scientific trends and issues, to develop and recommend policy direction to the top executive officers of the corporation, and he would have a significant impact on

the ultimate decision on such policies by virtue of his expertise and direct access to the decisionmakers. Such an employee would meet the definition of a "high policymaking" employee.

On the other hand, as this description makes clear, the support personnel of a "high policymaking" employee would not be subject to the exemption even if they supervise the development, and draft the recommendation, of various policies submitted by their supervisors.

(f) In order for the exemption to apply to a particular employee, the employee must have been in a "bona fide executive or high policymaking position," as those terms are defined in this section, for the two-year period immediately before retirement. Thus, an employee who holds two or more different positions during the two-year period is subject to the exemption only if each such job is an executive or high

policymaking position.

* * *

(h) The "annual retirement benefit," to which covered employees must be entitled, is the sum of amounts payable during each one-year period from the date on which such benefits first become receivable by the retiree. Once established, the annual period upon which calculations are based may not be changed from year to year.

(i) The annual retirement benefit must be immediately available to the employee to be retired pursuant to the exemption. For purposes of determining compliance, "immediate" means that the payment of plan benefits (in a lump sum or the first of a series of periodic payments) must occur not later than 60 days after the effective date of the retirement in question

* * *

(j)(1) The annual retirement benefit

must equal, in the aggregate, at least $27,000. . . .

* * *

(k)(1) The annual retirement benefit must be "nonforfeitable." Accordingly, the exemption may not be applied to any employee subject to plan provisions which could cause the cessation of payments to a retiree or result in the reduction of benefits to less than $27,000 in any one year. For example, where a plan contains a provision under which benefits would be suspended if a retiree engages in litigation against the former employer, or obtains employment with a competitor of the former employer, the retirement benefit will be deemed to be forfeitable. However, retirement benefits will not be deemed forfeitable solely because the benefits are discontinued or suspended for reasons permitted under section 411(a)(3) of the Internal Revenue Code.

* * *

[DEPARTMENT OF LABOR REGULATION]

29 C.F.R. §2530.203-3(a) & (c)

[Effective date January 1, 1982]

§2530.203-3 Suspension of pension benefits upon reemployment of retirees.

(a) *General.* Section 203 (a)(3)(B) of the Act provides that the right to the employer-derived portion of an accrued pension benefit shall not be treated as forfeitable solely because as employee pension benefit plan provides that the payment of benefits is suspended during certain periods of reemployment which occur subsequent to the commencement of payment of such benefits.

* * *

(c) *Section 203(a)(3)(B) Service.--(1) Plans other than multiemployerplans.*

In the case of a plan other than a multiemployer plan, as defined in section 3(37) of the Act, the employment of an employee, subsequent to the time the payment of benefits commenced on, would have commenced if the employee had not remained in or returned to employment, results in section 203(a)(3)(B) service during a calendar month if the employee, in such month, completes 40 or more hours of service, as defined in 29 CFR 2530.200b-2(a)(1), for an employer which maintaiins the plan, including employers described in §2530.210(d) and (e), as of the time that the payment of benefits commenced or would have commenced if the employee had not returned to employment.

* * *

[**Department of Labor Regulation**]

[Effective Date December 28, 1976]

29 C.F.R. §2530.210(b)

§2530.210 Employer or employers maintaining the plan.

* * *

(b) *General rules concerning service to be credited under this section.*

Section 210 of the Act and sections 413(c), 414(b), and 414(c) of the Code provide rules applicable to sections 202, 203, and 204 of the Act and sections 410, 411(a), and 411(b) of the Code for purposes of determining who is an "employer or employers maintaining the plan" and, accordingly, what service is required to be taken into account in the case of a plan maintained by more than one employer. Paragraphs (c) through (e) of this section set forth the rules for determining service required to be taken

into account in the case of a plan or plans maintained by multiple employers, controlled groups of corporations and trades or businesses under common control.

* * *

[PERTINENT PORTIONS OF NOTICES, INTERPRETATIONS, PROPOSED RULES, AND REGULATIONS AS PUBLISHED IN THE FEDERAL REGISTER]

43 F.R. p. 59098 (December 19, 1978)

DEPARTMENT OF LABOR

Pension and Welfare Benefit Programs

* * *

RULES AND REGULATIONS FOR MINIMUM STANDARDS FOR EMPLOYEE BENEFIT PLANS

Suspension of Benefit Rules

AGENCY: Department of Labor.

ACTION: Proposed rulemaking.

SUMMARY: This document contains a proposed regulation governing the circumstances in which it is permissible for a plan to suspend the payment of

benefits to a retiree. The Employee Retirement Income Security Act of 1974 (the Act) authorizes the Secretary of Labor to prescribe regulations setting forth the circumstances and conditions under which the right of a retiree to a benefit payment is not treated as forfeitable solely because the plan provides that benefit payments are suspended during periods of reemployment. The proposed regulation, if adopted, would affect employees covered under employee pension benefit plans.

DATES: Written comments must be received by the Department of Labor (the Department) on or before March 6, 1979. Except for paragraphs (b)(4) and (b)(6), the proposed regulation, if adopted, would become effective, for Title I purposes, 30 days after adoption. The proposed regulation for purposes of section 411(a)(3)(B) of the Internal

Revenue Code of 1954, as amended, and paragraphs (b)(4) and (b)(6) of the regulation for Title I purposes, would become effective for plan years beginning after the effective date of the regulation for Title I purposes. . . .

p. 59099-59100.

SUPPLEMENTARY INFORMATION: Notice is hereby given that the Department has under consideration a proposed regulation setting forth the circumstances and conditions under which a plan may provide that retirement benefits are to be suspended upon the reemployment of an employee who is receiving pension benefits. Plans which provide for suspension of benefits will be required to comply with all relevant aspects of the regulations, if adopted. To the extent that this regulation would impose

specific requirements not provided for in the Act, it would have only a prospective effect on the operation of plans and the rights of employees. Suspension of benefit payments by plans prior to adoption of the regulations will be governed by section 203(a)(3)(B) of the Act without reference to the regulation.

STATUTORY PROVISIONS

Under the minimum vesting standards for employee pension benefit plans contained in section 203 of the Act, an employee's rights to benefits derived from his own contributions may never be forfeited.

* * *

However, section 203(a)(3)(B) of the Act (and section 411(a)(3)(B) of the Internal Revenue Code of 1954, as amended (Code)) permits a plan to provide that, under certain conditions, the right to an accrued benefit derived from employer contributions may be suspended for

periods during which the employee is reemployed, without such suspension being deemed an impermissible forfeiture.

For a plan other than a multiemployer plan, such benefits may be suspended upon an employee's reemployment only if such reemployment is with an employer under whose plan the benefits are being paid.

* * *

PROPOSED REGULATIONS

1. *Employed in section 203(a)(3)(B) service.* The proposed regulation provides that a pension plan may permanently withhold certain accrued benefits which would otherwise have been payable to the retiree if the retiree is employed in "section 203(a)(3)(B) service."

* * *

If it is other than a multiemployer plan, as defined in section 3(37) of the Act, benefits may be suspended by the plan only if the retiree is employed by

an employer which maintains the plan. The regulation specifies that the term "employer which maintains the plan" includes employers described in 29 CFR §2530.210 (e) [sic] and (e). Thus, for example, members of a controlled group of corporations and commonly controlled trades or businesses may be considered to be an "employer which maintains the plan". . . .

p. 59102

* * *

STATUTORY AUTHORITY

The regulation is proposed under the authority contained in sections 203(a)(3)(B) and 505 of the Act (Pub. L. 93-406, 88 Stat. 854, 894, 29 U.S.C. 1053, 1135) and section 411(a)(3)(B) of the Code.

§2530.203-3 Suspension of pension benefits upon reemployment of retirees.

(a) *General*. Section 203(a)(3)(B) of

the Act provides that the right to the employer-derived portion of an accrued pension benefit shall not be treated as forfeitable solely because an employee pension benefit plan provides that the payment of benefits is suspended during certain periods of reemployment which occur subsequent to the commencement of payment of such benefits. This section sets forth the circumstances and conditions under which such benefit payments may be suspended.

(b) *Suspension rules.--(1) General rule.* A plan may provide for the permanent withholding of the suspendible amount of an employee's accrued benefit for each calendar month during which an employee is employed in "section 203(a)(3)(B) service", as described in §2530.203-3(c).

* * *

(c) *Section 203(a)(3)(B) Service.*--(1) *Plans other than multiemployer plans.* In

the case of a plan other than a multiemployer plan, as defined in section 3(37) of the Act, the employment of an employee, subsequent to the time the payment of benefits commenced or would have commenced if the employee had not remained in or returned to employment, results in section 203(a)(3)(B) service during a calendar month if the employee, in such month, completes 40 or more hours of service, as defined in 29 CFR §2530.200b-2(a)(1), for an employer which maintains the plan, including employers described in §2530.210(d) and (e). . . .

p. 59103

Signed at Washington, D.C. this 13th day of December, 1978.

Ian D. Lanoff,

Administrator, Pension and Welfare

Benefit Programs, Labor-Management Services Administration.

44 F.R. p.66791 (November 21, 1979)

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

* * *

Age Discrimination in Employment; Final Interpretations

AGENCY: Equal Employment Opportunity Commission.

ACTION: Final interpretations.

SUMMARY: On July 1, 1979, pursuant to Reorganization Plan No. 1 of 1978, 43 FR 19807 (May 9, 1978), responsibility and authority for enforcement of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621, 623, 625, 626-633 and 634 (ADEA) was transferred from the Department of Labor to the Equal Employment Opportunity Commission. The commission assumed enforcement of ADEA on that date. Prior to the transfer of

authority which occurred on July 1, 1979, the Department of Labor published for comment in the **Federal Register** proposed amendments to their existing interpretations of the ADEA. These proposed amendments included sections entitled * * * "Exemption for certain executive and high policymaking employees." Insofar as those sections have already been published for public comment, they are herein published as final interpretations of the Commission with certain changes made by the Department of Labor after careful consideration was given to the written comments on the proposed amendments.

EFFECTIVE DATE: Since the following final agency interpretations are interpretive rules or statements of policy, the 30-day delay in effective date as prescribed in Section 553(d) of Title 5 U.S. Code, does not apply. Accordingly, these interpretations are

effective November 21, 1979.

* * *

p. 66793

The Department of Labor published its proposal to add * * * a new §860.97 (now §1625.12) to the Interpretative Bulletin on the ADEA on December 12, 1978 (see 43 FR 58148). The purpose of these additions is to take account of an exemption in Section 12(c) of the Act which took effect on January 1, 1979, when the maximum age of individuals in the private sector and the non-Federal public sector protected by the Act was extended from age 65 to age 70. The exemption is as follows:

(c)(1) Nothing in this Act shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed inn a bona fide executive or a

high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

* * *

p. 66796

§1625.12(k)

The proposed interpretation dealt with the statutory requirement that the annual retirement benefit be "nonforfeitable."

Commentators have expressly requested the Commission to reconcile the proposed interpretation with section 411(a)(3) of the Internal Revenue Code (26 U.S.C. 411(a)(3)). Under section 411(a)(3), retirement benefits derived from employer contributions are not treated as forfeitable solely because the plan provides that such benefits are * * *

suspended during certain periods of reemployment. * * *

The proposed interpretations did not refer to these exceptions. However, the exceptions are specifically permitted by the Internal Revenue Code (as amended by ERISA) and are not irreconcilable with the term "nonforfeitable" as used in section 12(c) of the ADEA.
Accordingly, the Commission has chosen to adopt these section 411(a)(3) exceptions in its interpretation.

* * *

p. 66797

This document was originally prepared under the direction of the Deputy Administrator, Wage and Hour Division of the Department of Labor with the assistance of the Office of the Solicitor and the concurrence of the Office of the General Counsel of the Equal Employment Opportunity Commission. In addition, in accordance with Executive Order 12067,

the Commission has solicited the views of affected Federal agencies.

Signed at Washington, D.C., this 14th day of November 1979.

For the Commission,

Eleanor Holmes Norton,

Chair, Equal Employment Opportunity Commission.

Accordingly, new §§* * *1625.12, * * * are added to Title 29, Code of Federal Regulations.

IN THE UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	Jan. 30, 1981
	)	Herbert T. Hope,
vs.	)	Clerk]
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY	)	NO. CIV-81-114T
	)	
Defendant.	)	

COMPLAINT

COUNT I

Comes now the plaintiff and for cause of action against the defendant alleges and states:

* * *

[1]

* * *

JURY DEMANDED

[7]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	
	)	[FILED
Plaintiff,	)	9/30/81
	)	Herbert T. Hope
vs.	)	U.S. Dist. Ct.]
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	No. Civ-81-114T
	)	
Defendant.	)	

PLAINTIFF'S MOTION FOR PRODUCTION OF DOCUMENTS (RULE 34, F.R.C.P.)

Plaintiff Carl P. Caldwell requests Defendant Southwestern Bell Telephone Company to respond within thirty (30) days to the following requests:

1. That defendant produce and permit plaintiff to inspect and to copy each of the following documents:

* * *

(23) A copy of any and all documents issued by the defendant for the three year period prior to November 30, 1979 in which the defendant advised plaintiff that the defendant considered him to be a "bona fide executive" or in "a high

policy-making position" or words of similar import.

(24) A copy of each and every document issued by the defendant during the three year period prior to November 30, 1979 in which the defendant advised all salary grade 5A employees that they were considered by the defendant to be a "bona fide executive" or in "a high policy-making position" or words of similar import.

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	Nov. 2, 1981
	)	Herbert T. Hope
v.	)	Clerk]
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	No. CIV-81-1114T
	)	
Defendant.	)	

DEFENDANT'S RESPONSES TO PLAINTIFF'S MOTION FOR PRODUCTION OF DOCUMENTS

COMES NOW the defendant, in compliance with Rule 34 of the Federal Rules of Civil Procedure and responds to plaintiff's Motion for Production of Documents as follows:

* * *

RESPONSE NO. 23: Attached is a copy of all documents issued by the defendant for the three year period prior to November 30, 1979, in which the defendant advised the plaintiff that he was

considered to be a "bona fide executive" or in "a high policy-making position."

RESPONSE NO. 24: There are no documents issued by defendant advising all salary grade 5A employees that they were considered to be a "bona fide executive" or in "high policy-making position," and such is not defendant's policy.

[ATTACHED TO DEFENDANT'S RESPONSE #23]

October 11, 1979

Mr. Carl P. Caldwell

* * *

Dear Mr. Caldwell:

* * *

You will be 65 on November 19, 1979 and Section 4, Paragraph G of the Plan for Employees' Pensions, Disability Benefits and Death Benefits provides that employees referred to in Section 12 (c) (1) of the ADEA shall be retired not later than the last day of the month in which the sixty-fifth birthday occurs. Therefore, unless you wish an earlier retirement date your retirement will be effective November 30, 1979 with your pension to be effective December 1, 1979.

The three criteria used in determining that your retirement be at age 65 are as

follows:

1. The employee must be entitled to a pension of at least $27,000, after the cost, if any, of survivor annuity option.
2. The employee must have been in his/her position for two years prior to attaining age 65.
3. The employee's present position must be an "executive," policy making one.

* * *

Sincerely,

(Signed J.W. REDDOUT)

for Assistant Vice President & Secretary,
General Employees' Benefit Committee

[ATTACHED TO DEFENDANT'S RESPONSE #23]

Southwestern Bell
1010 Pine Street
St. Louis, MO 63101

F.H. Brockman
Assistant Vice President &
Secretary, General Employees'
Benefit Committee

November 20, 1979

Mr. Carl Caldwell

* * *

Dear Mr. Caldwell:

* * *

. . . . it is the policy of Southwestern Bell Telephone Company to retire employees at the age of 65 where lawful. The Age Discrimination in Employment Act of 1967, as amended in 1978, permits an employee to be retired

by his or her employer at the age of 65 when the employee is employed in a bona fide executive or a high policymaking position for a 2 year period preceding retirement and the employee is entitled to a pension of at least $27,000 a year.

In your capacity as General Manager-Comptrollers for more than the preceding two years, (i.e. from January 1, 1964 to November 30, 1979, date of retirement) you had the responsibility of managing and overseeing the entire Comptrollers organization for the state of Oklahoma. Given these job duties and responsibilities, the job of General Manager-Comptrollers was and is a bona fide executive position.

* * *

Sincerely,

/s/F.H. Brockman

IN THE UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	Nov. 2, 1981
	)	Herbert T. Hope,
v.	)	Clerk]
	)	
SOUTHWESTERN BELL TELEHPONE COMPANY,	)	
	)	
Defendant.	)	

DEFENDANT'S ANSWERS
TO PLAINTIFF'S INTERROGATORIES

COMES NOW the defendant and answers plaintiff's Interrogatories as follows:

* * *

INTERROGATORY NO. 18: Section 9 of the ADEA provides that the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out the provisions of the ADEA. By Section 2 of the 1978 Reorganization Plan No. 1, 92 Stat. 3781, those powers were

transferred to the Equal Employment Opportunity Commission. The EEOC's interpretation of the 1978 amendment of the ADEA with respect to the exception as to "bona fide executives" and those in a "high policy-making" position are set forth in 29 CFR 1625, effective November 21, 1979. Please identify the categories (as to job titles and pay grades) the defendant has designated as being within the criteria as set forth therein, both as to bona fide executives and those in a high policy-making position.

ANSWER: The defendant has not designated by job title or pay grade those employees who are considered to be bona fide executives and/or in high policymaking positions. Generally, however, each fifth level and above employee will be considered on a case-by-case basis to determine whether the criterion of the Act apply.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	
	)	[FILED
Plaintiff,	)	Jan. 26, 1982
	)	Herbert T. Hope
vs.	)	U.S. Dist. Ct.]
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	No. Civ-81-114T
	)	
Defendant.	)	

AMENDMENT TO COMPLAINT AND REQUEST OF PLAINTIFF TO FILE ADDITIONAL AMENDMENT

* * *

Comes now the plaintiff and shows to the Court that documents recently produced by defendant in response to discovery requests by plaintiff have revealed information that certain actions taken by defendant in connection with the involuntary retirement of plaintiff were in violation not only of the defendant's "Plan for Employees' Pensions, Disability Benefits and Death Benefits" as amended to January 1, 1979, but likewise in violation of applicable provisions of the Employee Retirement Income Security Act

of 1974, 29 U.S.C., Sections 1101-1381. By reason thereof plaintiff contends, in addition to the allegations of his Complaint, that his forced retirement was additionally brought about by an unauthorized and illegal effort to amend the "Plan" to encompass the provisions of Section 12(c)(1) of the ADEA with the result that said attempted amendment to the "Plan" was ineffective. Consequently, on Novemmber 30, 1979, the defendant had no basis on which to retire plaintiff as "a bona fide executive or in a high policy making position" with the defendant. Having validly adopted no amendments relating to the exception, the defendant was required by then applicable law to not violate the ADEA Act with respect to the protected group of employees aged 40 to 70, without exception. * * *

The form of the proposed amendment is attached, together with a brief.

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	No. Civ-81-114T
	)	
	)	
Defendant.	)	

[PROPOSED]
AMENDMENT TO COMPLAINT

Comes now the plaintiff and, with permission of Court, amends his Complaint as follows:

1. By adding, as paragraph 12(a):

"In addition, the defendant neglected to properly amend its 'Plan for Employees' Pensions, Disability Benefits and Death Benefits' with reference to the 'bona fide executive or high policy making position' exception to the 1979 amendment to the ADEA. For that reason, it had no legal authority on which to base its

decision to retire plaintiff at age 65 and such act constituted a violation of the ADEA in that plaintiff had not attained the age of 70 years."

* * *

IN THE UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	[FILED
	)	U.S. District Ct.
Plaintiff,	)	March 11, 1982
	)	Herbert T. Hope
vs.	)	Clerk]
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	No. CIV-81-114-T
	)	
Defendant.	)	

MOTION FOR SUMMARY JUDGMENT

COMES NOW the Defendant, Southwestern Bell Telephone Company and moves the Court to grant Defendant's Motion for Summary Judgment on the issue of bona fide executive for the reasons set forth in the attached brief.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

CARL P. CALDWELL,	)	
	)	[FILED
Plaintiff,	)	May 3, 1984
	)	Herbert T. Hope
vs.	)	U.S. Dist. Ct.]
	)	
SOUTHWESTERN BELL TELEPHONE COMPANY,	)	No. Civ-81-114T
	)	
Defendant.	)	

PLAINTIFF'S MOTION TO FILE ADDITIONAL AMENDMENTS TO COMPLAINT

FIRST AMENDMENT

COMES NOW the plaintiff and moves this Court for leave to amend his Complaint by adding the two additional paragraphs originally requested to be added by plaintiff on January 26, 1982. . . . attached hereto.) In support thereof plaintiff would show:

1. On January 26, 1982, plaintiff filed a request to file additional amendments to his Complaint, the proposed amendments, and a brief in support thereof.

2. On August 20, 1982, the Court

entered an order denying said request to amend on the basis that it was "moot" in view of the Court's decision on that same date sustaining plaintiff's Motion for Partial Summary Judgment.

* * *

WHEREFORE, plaintiff prays the attached proposed order be entered granting plaintiff's Motion to File Additional Amendments as to plaintiff's first amendment;. . .

* * *

[PORTION OF BELL'S RESPONSE TO PLAINTIFF'S REQUEST FOR PRODUCTION OF DOCUMENT #8 FILED NOVEMBER 2, 1981]

AT&T
American Telephone and
Telegraph Company
295 North Maple Avenue
Basking Ridge, N.J. 07920

EMPLOYEES' BENEFIT COMMITTEE

* * *

May 24, 1978

TO ALL BENEFIT SECRETARIES:

I would like to share with you recent developments regarding the federally legislated change in the mandatory retirement age.

At the Presidents' Conference held the first week in May, Mr. E.W. Clarke, Jr.

discussed the issues and recommendations as stated in the attached presentation.

* * *

Sincerely,

/s/Therese F. Pick

["Attached Presentation" to May 24, 1978 letter from Therese F. Pick]

MANADATORY RETIREMENT AGE ISSUE

IN APRIL, LEGISLATION WAS SIGNED BY THE PRESIDENT WHICH OFFICIALLY RAISES THE PREMISSIBLE MANDATORY RETIREMENT AGE FROM 65 TO 70 YEARS OF AGE. PL 95-256 AMENDS THE AGE DISCRIMINATION IN EMPLOYMENT ACT (ADEA) OF 1967. ESTIMATES AS TO THE NATIONAL IMPACT OF THIS LAW HAVE INDICATED THAT PERHAPS 200,000 EMPLOYEES COULD BE AFFECTED. THE BELL SYSTEM SHARE OF THIS TOTAL IS EXPECTED TO BE MINIMAL. PRESENTLY ONLY 20-25% OF THOSE RETIRING LEAVE AT AGE 65. IT IS NOT ANTICIPATED THAT SUBSTANTIAL NUMBERS OF EMPLOYEES, WHEN PERMITTED TO DO SO, WILL RETIRE AFTER AGE 65. HOWEVER, WE DO ANTICIPATE DIFFICULT ADMINISTRATIVE PROBLEMS AND

PROBABLY SOME LITIGATION.

* * *

IN REVIEWING THE CHANGES, SEVERAL INTERESTING PROVISIONS HAVE BEEN INCLUDED, ONE OF WHICH, THE EXECUTIVE EXEMPTION, WAS BROUGHT ABOUT AT THE URGING OF THE CONGRESS AND SENATE BY THE BUSINESS COMMUNITY, A PROCESS INTO WHICH WE HAD SOME INPUT.

IT STATES THAT "BONA-FIDE EXECUTIVES OR HIGH POLICY MAKING EMPLOYEES" MAY CONTINUE TO BE TREATED UNDER A MANADATORY AGE 65 RETIREMENT POLICY, PROVIDED THAT SUCH INDIVIDUALS HAVE OCCUPIED SUCH A POSITION FOR A PERIOD OF AT LEAST TWO YEARS AND ARE CURRENTLY ENTITLED TO A COMPANY-PAID RETIREMENT BENEFIT OF AT LEAST $27,000 PER YEAR.

ASSUMING AN AVERAGE OF 40 YEARS' COMPANY SERVICE FOR THIS AGE GROUP, UNDER THE PRESENT PENSION FORMULA, A $27,000

PENSION WOULD REQUIRE A FIVE YEAR AVERAGE SALARY OF APPROXIMATELY $52,000. THEREFORE, PROBABLY ALL CURRENT 5TH LEVEL EMPLOYEES AND PERHAPS, LATER, SOME 4TH LEVEL INDIVIDUALS WILL QUALIFY. (CURRENTLY AT&T, LONG LINES, NEW YORK TELEPHONE AND BELL TELEPHONE COMPANY OF PENNSYLVANIA HAVE 4TH LEVEL CONTROL RATES ABOVE $52,000). SINCE THE $27,000 FIGURE IS NON-ESCALATING WE WILL HAVE IN THE FUTURE AN INCREASING NUMBER OF PERSONS WITH A PENSION OF THAT AMOUNT.

THERE IS SOME TROUBLE WITH THE DEFINITION OF "EXECUTIVE" AS IT APPLIES IN THIS INSTANCE. THERE ARE VARIOUS METHODS OF APPROACHING THE DEFINITION. THE STATUTE HAS STATED THAT THE FLSA (FAIR LABOR STANDARDS ACT) DEFINITION, SHOULD BE APPLIED.

* * *

OUR INTENT HERE IS TO UTILIZE THE $27,000 EXECUTIVE EXEMPTION PROVISION FULLY. WE

MAY, HOWEVER, AT SOME POINT BE CHALLENGED ON OUR APPROACH. FOR INSTANCE, FINAL REGULATIONS, WHEN WRITTEN MAY EXCLUDE OUR 4TH LEVEL PEOPLE FROM CONSIDERATION AS "EXECUTIVES". * * *

[Portion of Bell's Response #3 to Caldwell's Request for Porduction of Documents, Filed November 2, 1981]

MINUTES

SOUTHWESTERN BELL TELEPHONE COMPANY

GENERAL EMPLOYEES' BENEFIT COMMITTEE

SPECIAL MEETING DECEMBER 20, 1978

A special meeting of the General Employees' Benefit Committee was held at 2:00 p.m., Wednesday, December 20, 1978, Room 2408, Telephone Building, Saint Louis, Missouri.

Presiding: Mr. H.D. Schodde

Present: Mr. J.C. Denneny
Mr. J.F. Haake

Secretary: Mr. F.H. Brockman

* * *

Advisor: Mr. W.C. Sullivan

The Committee considered the Chairman's proposed changes in the Plan for Employees' Pensions, Disability Benefits and Death Benefits. Whereupon, it was:

RESOLVED: That upon consent of the President, the Plan for Employees' Pensions, Disability Benefits and Death Benefits be and hereby is amended effective January 1, 1979, in accordance with Committee's report to the President dated December 20, 1978, dealing with the 1978 amendments to the Age Discrimination in Employment Act; subject to such changes, including retroactive changes as may be necessary to obtain an Internal Revenue Service ruling that the Plan and trust are qualified and exempt under the

Internal Revenue Code and such other changes as may be necessary to comply with applicable law; provided, however, that if the Internal Revenue Service determines the Plan is not qualified and exempt by reason of any said amendments, then in such event said amendment or amendments shall be of no force and effect.

On recommendation of the Chairman, it was voted that the Chairman be authorized to send the President a letter, copy of which is attached, recommending the changes in the Plan for Employees' Pensions, Disability Benefits and Death Benefits, with the request that the President submit the changes to the Board of Directors for consideration.

ADJOURNED:

Approved:

/s/ F.H. Brockman
Secretary

/s/ H.D.Schodde
Chairman

[Portion of Bell's Response #3 to Caldwell's Request for Production of Documents. Filed 11/2/81.]

St. Louis, December 20, 1978

MR. BARNES:

The Benefit Committee requests your consent to make several amendments to the Plan for Employees' Pensions, Disability Benefits and Death Benefits (the "Plan") to conform to the change in the mandatory retirement age from age 65 to age 70 that will become effective January 1, 1979 for all employees of this Company except those covered by the Executive Exemption under Section 12 (c) (1) of the Age Discrimination in Employment Act as amended in 1978.

Attached is a summary of the principal amendments to the Plan to be effective January 1, 1979. Although these amendments become effective January 1, 1979, they will remain subject to future change to conform to Department of Labor

regulations which are expected to be issued next year or to conform to Internal Revenue Service findings regarding Plan qualification. In addition, the implementation of the change in the mandatory retirement age and the application of the Executive Exemption are subject to further changes to conform to state statutes dealing with age discrimination in employment.

Since the proposed changes are either required or made desirable by the 1978 amendments to the Age Discrimination in Employment Act, it is the Committee's opinion that these changes require only your consent and not additional approval of the Board. The proposed Plan changes have been discussed with the labor union representing our employees.

Employees' Benefit Committee
/s/ H.D. Schodde
Chairman

Approved:

/s/ Z.E. Barnes
President

12-21-78
Date

[Portion of Bell's Pension Plan Dated Jan. 1, 1979 and Produced by Bell on Jan. 12, 1982 in Response to Caldwell's Request for Production of Documents and Filed in the Trial Court.]

SECTION 4. PENSIONS

1. Eligibility

* * *

g. Mandatory Retirement Age

Each employee shall be retired from active service, whether or not he is eligible for a pension, not later than the last day of the month in which his seventieth birthday occurs except as otherwise provided by applicable state law and except those employees referred to in Section 12(c)(1) of the ADEA who shall be retired not later than the last day of the month in which the sixty-fifth birthday occurs* * *

* * *

6. Payment Treatment During Subsequent Bell Employment

Regular employment with this Company or with any company with which arrangements for interchange of benefit obligations, as described in Section 9 of these Regulations, have been made directly or indirectly, shall suspend the right of a retired employee * * * to pension payments during the period he continues in such employment. If the employee's prior service with this Company is included with such employment as part of his term of employment in the grant of a new pension, any previous eligibility for a pension hereunder shall cease.

* * *

SECTION 9. INTERCHANGE OF BENEFIT OBLIGATIONS

Agreement may be made by this Company with the American Telephone and Telegraph

Company for an interchange with that Company and its Associated or Allied Companies of the benefit obligations to which such Companies may be subject under plans for employees' pensions, disability benefits and death benefits. The general provisions of such agreement will be:

* * *

b. Transfer of Service Credit

That an employee's term of employment, as hereinbefore defined, shall include employment not only in this Company and the American Telephone and Telegraph Company, but also in any other Company with which reciprocal agreements under this Plan shall have been made by the American Telephone and Telegraph Company.

* * *

SECTION 10. CHANGES IN PLAN

The Committee, with the consent of the President, and subject to the approval of the Board of Directors (or without such approval in the case of changes which, in the opinion of the Committee, are dictated by requirements of federal or state statutes applicable to the Company or authorized or made desirable by such statutes) may from time to time make changes in the Plan set forth in these Regulations, and the Company may terminate said Plan, but such changes or termination shall not affect the rights of any employee, without his consent, to any benefit or pension to which he may have previously become entitled hereunder.

[Portion of Bell's Organization Chart Only Reflecting Caldwell's Chain of Command & Employees Under Each Manager in that Chain of Command, Produced by Bell in Response to Caldwell's Request for Production of Documents and Filed in the Trial Court on November 2, 1981]

ORGANIZATION CHARTS

COMPANY HEADQUARTERS

SOUTHWESTERN BELL TELEPHONE COMPANY

APRIL 1, 1979

PRESIDENT

Zane E. Barnes (95,273)

VICE PRESIDENT-FINANCE AND

COMPTROLLER

Louis C. Bailey (4,852)

* * *

DIRECTOR COMPTROLLERS

OPERATIONS

Robert N. Schoonmaker (3,655)

GENERAL MANAGER-COMPTROLLERS

Carl Caldwell (433)

Oklahoma Area

[Portion of Bell's Organization Chart Reflecting Chain of Command for Parsons & Above, Produced by Bell in Response to Caldwell's Request for Production of Documents and Filed in the Trial Court on November 2, 1981]

ORGANIZATION CHARTS

COMPANY HEADQUARTERS

SOUTHWESTERN BELL TELEPHONE COMPANY

APRIL 1, 1979

PRESIDENT

Zane E. Barnes (95,273)

EXECUTIVE VICE PRESIDENT

Joe H. Hunt (89,706)

VICE PRESIDENT-OKLAHOMA

John R. Parsons (9,813)

[List of Bell's 15 Vice Presidents in Organization Charts, Produced by Bell in response to Caldwell's Requesr for Production of Documents and Filed in the Trial Court on November 2, 1981.]

ORGANIZATION CHARTS

COMPANY HEADQUARTERS

SOUTHWESTERN BELL TELEPHONE COMPANY

APRIL 1, 1979

VICE PRESIDENT-FINANCE AND COMPTROLLER

Louis C. Bailey (4,852)

VICE PRESIDENT, GENERAL COUNSEL AND SECRETARY

Wayne E. Babler (155)

EXECUTIVE VICE PRESIDENT

Joe H. Hunt (89,706)

VICE PRESIDENT

Don L. Smith (232)

VICE PRESIDENT

Band D. Schodde (222)

VICE PRESIDENT

Stuart R. Trottmann, Jr. (91)

SENIOR VICE PRESIDENT-BUSINESS

James P. Haake (4,121)

VICE PRESIDENT-RESIDENCE AND PUBLIC SERVICE

James R. Adams (864)

VICE PRESIDENT-NETWORK

Ross H. Spicer (449)

VICE PRESIDENT-ARKANSAS

James B. Nichols (5,524)

VICE PRESIDENT-KANSAS

John E. Hayes, Jr. (5,956)

VICE PRESIDENT-MISSOURI

R. Ray Shockley (14,295)

VICE PRESIDENT-OKLAHOMA

John R. Parsons (9,813)

VICE PRESIDENT-TEXAS

Doyle E. Rogers (47,674)

VICE PRESIDENT-SALES OPERATIONS (North Region)

James C. Denneny (1,743)

INTERNAL REVENUE SERVICE

* * *

PLAN NAME PLAN FOR EMPLOYEES PENSIONS DISABILITY BENEFITS AND DEATH BENEFITS

CASE NO 13911502EP
CONTROL DATE 04-12-79
FORM NO 5300
EMP ID NO 43-0529710
PLAN NO 001
FILE NO 130004588

SOUTHWESTERN BELL TELEPHONE COMPANY

* * *

JUL 11 1979

Dear Applicant:

Based on the information supplied, we have made a favorable determination on your application identified above. Please keep this letter in your permanent records.

* * *

This letter relates only to the status of your plan under the Internal Revenue Code. It is not a determination regarding the effect of other Federal or local statutes.

* * *

Sincerely yours,

/s/Charles H. Brennan
DISTRICT DIRECTOR

[Portion of Response No. 8 to Bell's Response to Caldwell's Production of Document Request Filed on November 2, 1981]

November 6, 1978

Interim Guidelines for Application

of the

Executive Exemption Under ADEA

* * *

A. Based on the following descriptions of a bona fide executive and a high policymaking position as contained in the conference Report of the U.S. Congress, generally all fifth level employees and above will be covered under the Executive Exemption provided:

* * *

[Portion of Bell's Brief in Support of its Motion for Summary Judgment filed 3/11/82.]

* * *

The fifth level of management is also referred to as the "department head" level. The officer level is sometimes also referred to as level six.

* * *

[REPRESENTATIVE SAMPLE OF PORTION OF INTERCHANGE AGREEMENTS BETWEEN ALL INTERCHANGE COMPANIES INCLUDING BELL AND ATTACHED AS AN EXHIBIT TO 3/19/82 AFFIDAVIT OF THERESE PICK OF AT&T & FILED IN THE DISTRICT COURT]

The American Company agrees that, in determining under its Plan the term of employment of persons who have been or hereafter shall become employees of the Southwestern Bell Company, and who subsequently have entered or shall enter the employment of the American Company, it, the said American Company, will allow full credit for the period of employment which, at the termination of the employee's service with the Southwestern Bell Company, constituted his term of employment under the Plan of that Company; subject, however, to the following conditions:-

(a) The credit above described will be allowed at the time the employee enters the service of the American Company in cases in

which the employee's service with that Company is continuous with service with the Southwestern Bell Company, or is continuous with other service which the American Company credits at that time in determining term of employment under its Plan, such other service being continuous with service with the Southwestern Bell Company.

* * *

Notice of 1985 Annual Meeting

and Proxy Statement

Southwestern Bell

Corporation

Executive Compensation

The following table sets forth all cash compensation paid or accrued during the year ended December 31, 1984, for services rendered during 1984 in all capacities to the Corporation and its subsidiaries for the five most highly compensated executive officers of the Corporation, and of all executive officers as a group.

Name	Capacities In Which Served	Annual Salary	Short Term Incentive Plan Award*
Zane E. Barnes	Chairman of the Board, President	$475,000	$375,000

& Chief
Executive
Officer

* * *

The Corporation has separate non-contributory pension plans for management and non-management employees. Under the management pension plan, retirement is mandatory at age 65† for officers and other executives;

* * *

†On January 22, 1985 the Board of Directors requested that Mr. Barnes continue as Chairman and Chief Executive Officer of the Corporation through the end of 1989. Mr. Barnes will reach the normal retirement age of 65 in 1986.

[Portion of Bell's Jan. 12, 1982 Response #4 to Caldwell's Production of Document Request Filed in the District Court. Column entitled "Number of Subordinates" is Abbreviated to read "No. of Subord." and words "Assistant Vice President" are abbreviated to read "Asst. Vice Pres." in order to allow document to be reproduced within Supreme Court spacing requirements.]

NAME		JOB TITLE	NO. OF SUBORD.
Ames	HD	Asst. Vice Pres.	85
Ayers	JE	General Manager	3025
Bailey	JC	General Manager	255
Bates	RC	General Manager	570
Beckstead	RF	General Manager	337
Bock	WE	General Manager	630
Bowen	JF	General Manager	1461
Browning	JD	General Manager	2526
Caldwell	CP	General Manager	433
Callaway	JW	General Manager	279
Carroll	MA	General Manager	363
Castle	TR	General Manager	1199
Charpentier	DW	Asst. Vice Pres.	131
Coffman	JD	Asst. Vice Pres.	716
Davis	TC	General Manager	2923
Davison	ML	Asst. Vice Pres.	1
Dickerson	CR	General Manager	2096
Dimmitt	LA	General Attorney	11
Douglass,Jr	RS	General Manager	282
Duke	WN	Asst. Vice Pres.	166
Eickhoff,Jr	LE	General Attorney	6

NAME		JOB TITLE	NO. OF SUBORD.
Ellis	JD	General Attorney	14
Ellis	JB	General Manager	457
Flath	JC	General Manager	2297
Free	WJ	General Attorney	11
Gaubatz	EL	Asst. Vice Pres.	19
Gibson	GT	General Manager	3166
Golden	JS	General Attorney	4
Griep	WA	General Manager	1578
Griffin	LR	General Manager	2379
Hall	WT	General Manager	2901
Hand	JH	General Attorney	17
Harris	RA	Asst. Vice Pres.	21
Hatter	RJ	General Manager	192
Holigan	H	General Manager	1666
Jones, Jr	H	Asst. Vice Pres.	56
Keith	JE	Asst. Vice Pres.	93
Kopf	ML	General Manager	732
Lance	BC	Asst. Vice Pres.	598
Lawrence	JD	General Attorney	3
Lemay	RT	Asst. Vice Pres.	21
Little	WA	Asst. Vice Pres.	125

NAME		JOB TITLE	NO. OF SUBORD.
Macha	R	General Manager	495
Mazur	JA	General Manager	653
McElroy	RL	Asst. Vice Pres.	654
McIntyre	KJ	General Manager	1912
Meers	WW	General Manager	2345
Parker	PJ	General Manager	1943
Rahoy	JD	General Attorney	5
Robbins	C	General Manager	2994
Shatto	JM	General Attorney	15
Sheppard,Jr	WP	General Manager	3420
Sparks	RT	General Manager	4384
Stuckey	NS	General Manager	1925
Taylor	JE	General Attorney	7
Walker	JR	General Manager	3852
Wegner	RJ	General Manager	1731
White	RW	General Manager	2603
Zimmerman,Jr	LW	General Manager	4097
Andrews	WB	Asst. Vice Pres.	413
Arms	RM	Asst. Vice Pres.	448
Arnold	JM	Asst. Vice Pres.	54
Barone	JL	Asst. Vice Pres.	7

NAME		JOB TITLE	NO. OF SUBORD.
Baxter	ND	Asst. Vice Pres.	30
Berry	FW	Asst. Vice Pres.	17
Bettis	ZF	Asst. Vice Pres.	16
Bouldin	JS	General Manager	1472
Boutin	CR	Asst. Vice Pres.	54
Brockman	FH	Asst. Vice Pres.	21
Brunworth	W	Asst. Vice Pres.	110
Bryant	WG	Asst. Vice Pres.	7
Caldwell	RS	Asst. Vice Pres.	772
Carothers	LC	Asst. Vice Pres.	178
Cathey	SB	Asst. Vice Pres.	12
Coonan	LS	General Attorney	9
Costello	JE	Asst. Vice Pres.	61
Crice	HE	Asst. Vice Pres.	45
Davis	J	Asst. Vice Pres.	22
Dreyer	WE	General Manager	2060
Dupre	DD	General Attorney	8
Earhart	RG	General Manager	904
Everitt	EM	Asst. Vice Pres.	52
Fries	ID	General Manager	732
Fuller	BF	Asst. Vice Pres.	17

NAME		JOB TITLE	NO. OF SUBORD.
Gilliam,Jr	NF	Asst. Vice Pres.	83
Glaser	RH	Asst. Vice Pres.	4
Hall	JF	Asst. Vice Pres.	50
Hammer	ML	Asst. Vice Pres.	27
Hargis	WC	Asst. Vice Pres.	72
Hatch	JF	Asst. Vice Pres.	181
Haydon	WC	General Manager	300
Haywood,Jr	SR	General Manager	2593
Heger	FL	Asst. Vice Pres.	202
Hudson	LH	General Manager	238
Jordan	WH	General Manager	212
Kaufman	KC	Asst. Vice Pres.	30
Keltner	KW	General Manager	1249
Kice, Jr	EE	Asst. Vice Pres.	76
Klein	MA	Asst. Vice Pres.	62
Long	RA	Asst. Vice Pres.	46
Lottmann	DC	Asst. Vice Pres.	17
Maranto	SP	Asst. Vice Pres.	18
Maus	RM	Asst. Vice Pres.	151
Miller	AO	Asst. Vice Pres.	51
Miller,Jr	GE	Asst. Vice Pres.	60

NAME		JOB TITLE	NO. OF SUBORD.
Mitchell	PP	Asst. Vice Pres.	357
Moore,Jr	EP	Asst. Vice Pres.	82
Murphy	EC	Asst. Vice Pres.	14
Nease	JD	Asst. Vice Pres.	87
Payne	CB	Asst. Vice Pres.	1
Phillips	JB	Asst. Vice Pres.	2
Powers	RL	General Manager	972
Randle	JL	General Attorney	1
Rascher	LA	Asst. Vice Pres.	36
Schenck	FP	General Manager	355
Schmidt	WE	Asst. Vice Pres.	262
Schodde	RL	General Manager	1815
Seyler	RE	Asst. Vice Pres.	313
Shaffer	DW	Asst. Vice Pres.	1087
Terrell	GE	Asst. Vice Pres.	22
Vehige	RJ	Asst. Vice Pres.	271
Wade	DE	General Manager	204
West	CM	Asst. Vice Pres.	537
Whitton,Jr	RM	General Manager	2520
Wilcox,Jr	ME	General Manager	774
Wilson,Jr	JB	Asst. Vice Pres.	55

NAME		JOB TITLE	NO. OF SUBORD.
Withers	JO	Asst. Vice Pres.	58

CERTIFICATE OF SERVICE

Joseph A. Claro, a member of the Bar of this Court hereby certifies that on the 30th day of August, 1989, three copies of the above and foregoing instrument were deposited in a United States Mail box, with first-class postage prepaid, and addressed to counsel of record for respondent, at said counsel's post office address as follows:

Mona S. Lambird, Esq.
Andrews, Davis, Legg
Bixler, Milstein and Murrah
500 West Main
Oklahoma City, OK 73102

Respondent is the only party required to be served herewith.

_____
Joseph A. Claro